

REIA Guidelines

An Introduction to the New Privacy Issues in the Real Estate Sector

Real Estate Institute members should note that from 21 December 2001 (or 21 December 2002) they may have to comply with new privacy laws covering information and opinions processed by them about individuals whose identity is apparent or can be ascertained.

The 2001 date will apply to all businesses with an annual turnover of more than \$3 million while the 2002 date applies to all other businesses who derive a 'benefit, service or advantage' by the collection or disclosure of such information.

Who is covered?

Members who derive a 'benefit, service or advantage' by the collection or disclosure of information and all members who have an annual turnover of more than \$3 million (even if they do not get a benefit from collection or disclosure) will have to comply with the new law.

The term 'benefit, service or advantage' is not limited to situations where information is traded for money. It covers not only businesses which buy or sell personal information but also any other businesses which get some real return from either the collection or disclosure of information, even if that return is not a payment of money.

Members who use tenancy databases, for example, rely on a flow of personal information to and from the organisations maintaining the databases. If this flow of information occurs for a 'benefit, service or advantage' the organisations and members must comply with the new law. Any member who manages property, therefore, must comply with the new law.

If you do not manage property in your real estate business, you are probably exempt from the law if your annual turnover is less than \$3 million.

General obligations

This fact sheet focuses on four areas which are likely to be of most significance to members: collection, use & disclosure; access & correction and openness. These obligations will apply to all personal information collected after 21 December. In addition, access and correction rights will also apply to information collected before that time (including information already held that is used or disclosed after that time) unless providing access would be too difficult administratively or unreasonably expensive. The obligations with respect to openness will apply to information whenever it was collected.

The new law also requires that the quality and security of personal information is maintained, that where requested and possible, organisations deal with people anonymously, that information is not exported from Australia in an unprotected way and that some Commonwealth government identifiers are not used or disclosed.

Collection

From 21 December 2001, members who are covered by the law should only collect personal information that it is necessary for one or more of their real estate practice functions or activities. Other personal information must not be collected. It may be, for example, that members routinely collect information about marital status when that is not really necessary for the job they are doing. Members must also deal with people anonymously where it is practicable and legal.

Sensitive information about a person's religious, political or philosophical beliefs, race, sexual preferences, trade union affiliations and criminal record cannot generally be collected without the consent of the individual concerned.

Where possible information should be collected directly from the individual that it is about and only in lawful, fair and reasonably unintrusive ways.

At or before the time of collection (or as soon as practicable after) the individual must be made aware of:

- the member's identity and contact details;
 - the purpose of collection;
 - the individual's right to access the information;
 - the types of organisations to which the member discloses that sort information;
 - any law requiring the collection; and
 - the consequences of failing to provide the information.
- If it is not reasonable or practicable to collect the information directly, members must still take reasonable steps to ensure that the relevant individual is aware of these matters.

Use & Disclosure

Provided the obligations with respect to collection were followed, personal information can be freely used and disclosed for the purpose for which it was collected. It is therefore important that members think clearly about the purpose for which they collect information when developing and providing collection notices.

Members will not be permitted to use or disclose personal information for purposes other than the primary (notified) purpose of collection unless specific conditions are met.

The simplest way of legitimately using or disclosing information for such secondary purposes may often be to get the relevant individual's consent. This consent could be obtained at any time (including at the time of initial collection) prior to the secondary use or disclosure. Again the collection notice will be important.

Secondary uses and disclosures of information that are related to the primary purpose will also be permissible if the individual is likely to expect those uses and disclosures, even if they have not actually consented to them.

Direct marketing

Direct marketing is a special case. If the individual has not consented to the use of personal information for direct marketing, or it is not a use that is both related to the primary purpose and likely to be expected by the individual, the information can only be used for direct marketing if:

- the individual has both not asked not to receive direct marketing and no charge will be made to effect such a request;
- it is impracticable to seek consent prior to the particular use; and
- each direct marketing communication includes the member's contact details and an option not to receive further direct marketing.

Sensitive information can never be used for the secondary purpose of direct marketing without consent.

Other limited uses and disclosures are permitted for secondary purposes relating to law enforcement and public safety.

Access & Correction

From 21 December 2001 members must generally provide individuals with access to all information held about them. This includes an obligation to provide access to information currently held if it is used or disclosed after 21 December 2001, unless it would impose an unreasonable burden or expense on the member. Information to which access must generally be granted includes opinions and may include evaluative information. No charge can be levied for applications for access and any charge for access itself must not be excessive.

Access can only be refused if:

- it would pose a serious and imminent threat to life or health of any individual; it would provide an unreasonable impact on the privacy of others;
- the request is frivolous or vexatious;
- the information relates to legal proceedings with the individual and would not be accessible through discovery in those proceedings;
- access would reveal intentions in negotiations with the individual in a way that would prejudice those negotiations;
- it would be unlawful or is required or authorised under law;
- it would prejudice the investigation of an unlawful activity or other law enforcement.

If access is refused for one of these reasons, consideration should still be given as to whether the use of mutually agreed intermediaries would allow sufficient access.

Reasons must be given for a refusal to provide access and for a refusal to correct an individual's records.

If access would reveal evaluative information about a commercially sensitive decision making process, members may be able to provide an explanation for the decision rather than access to the information itself.

If an individual can show that information is not accurate, complete and up to date, reasonable steps must be taken to correct it. If a member and an individual are unable to agree about the accuracy of information, the member must take reasonable steps to include a statement to that effect with the information.

Openness

Members will be required to set out their policies on the management of personal information in a clearly expressed document which it must make available to anyone who asks for it. On request, members must also take reasonable steps to let people know, in general terms what sort of personal information it holds

and how it collects, holds, uses and discloses that information.

Summary

For most members, the new law will take effect from 21 December 2002. The Real Estate Institute of Australia (REIA) and the State and Territory Real Estate Institutes will be using that time to inform members of their obligations and rights under the legislation and to develop a compliance training program.

Members should start to review their information holdings, in light of this advice, to ensure that they will comply with the Act. While access by an individual to records of personal information held about them will only apply from 21 December 2001 (or 2002), the access will be to the complete record if the information is used or disclosed after 21 December 2001. Members should consider reviewing those records now, particularly in relation to opinion and/or evaluative comments.

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