

**DRAFT GUIDANCE ON RECORD KEEPING REQUIREMENTS FOR
ESTATE AGENTS – TO BE READ IN CONJUNCTION WITH THE DRAFT
ESTATE AGENTS (RECORD KEEPING) REGULATIONS**

Contents

- 1. Introduction and background**
- 2. The permanent records to be kept**
- 3. The manner in which permanent records are to be kept**
- 4. The places at which permanent records are to be kept**
- 5. Enforcement**

1. Introduction and background

This guidance describes the requirements for estate agents set out in the Estate Agents Act 1979 (EAA 79), as amended by the Consumers, Estate Agents and Redress Act 2007 (CEARA 07), and the draft Estate Agents (Record Keeping) Regulations, to record and keep permanent records of their transactions with clients and third parties.

The guidance does not cover any other requirements in EAA 79 or other legislation affecting estate agents.

Audience

This guidance is aimed primarily at persons who engage in estate agency work as defined by EAA 79. It will also be of interest to persons who have responsibility for enforcing the duties under EAA 79: Local Authority Trading Standards Departments in England, Wales and Scotland, the Department of Enterprise, Trade and Investment in Northern Ireland and the Office of Fair Trading (OFT).

Policy aim

EAA 79, as amended by CEARA 07, contains a new requirement on estate agents engaged in estate agency work to keep records (“permanent records”) for a period of at least six years.

Estate agents are already required to forward promptly and “in writing” details of offers (other than those offers the seller has indicated in writing he does not wish to receive) from prospective buyers to sellers. Failure to do so is classified as an undesirable practice, which is a trigger enabling the OFT to consider an estate agent’s fitness to operate. Until now there has not been a requirement to keep records of offer letters and other communications sent to clients and third parties after sending. The introduction of a formal duty to keep records will provide enforcers with audit trails, making it easier to obtain evidence to prove misconduct and take enforcement action.

The record keeping provisions are the last part of CEARA 07 relating to estate agents to be implemented, and follow the introduction of statutory redress scheme membership and changes to the enforcement and entry and inspection parts of the Act.

Record keeping provisions in EAA 79

When new section 21A of EAA 79 is commenced, estate agents will be required to keep permanent records of:

- information given to clients about their prospective liabilities to the estate agent, such as the fees and charges they will have to pay and the circumstances in which they are payable, as required by sections 18(1) and (3) of EAA 79; and

- disclosures made about their personal interest in a transaction as required by sections 21(1) and (2) of EAA 79.

Record keeping regulations

Section 21A of EAA 79 contains a number of order making powers enabling the Secretary of State to require the keeping of further records by means of regulations and specify the way in which records are kept.

The Government intends to exercise powers to:

- require the keeping of records relating to offers of a prescribed description and information and actions relating to such offers
- require the keeping of records of other information or events of a prescribed description
- specify the manner in which permanent records are to be kept
- specify the place or places at which permanent records are to be kept

The Government will **not** exercise powers to require the keeping of additional information relating to a client's prospective liabilities to an estate agent and an estate agent's personal interest in a transaction referred to in sections 21 (4) (a) and (b) of EAA 79.

The additional requirements to be made are set out in the draft Estate Agents (Record Keeping) Regulations. These Regulations should be read alongside the relevant provisions of EAA 79, including in particular section 21A¹.

Coverage

The record keeping requirements in Section 21A of EAA 79 and the draft Estate Agents (Record Keeping) Regulations (collectively "the record keeping requirements") apply to persons carrying out estate agency work as defined in section 1 of EAA 79. The duty to keep permanent records will therefore apply to all businesses carrying out estate agency work, regardless of whether or not they call themselves estate agents.

Persons engaged in activities that are not within scope under EAA 79, such as solicitors, are exempt from the duty to keep permanent records.

Unlike the Estate Agents (Redress Scheme) Order 2008, the record keeping requirements apply to both residential and commercial estate agency work.

It is the Government's intention that the record keeping regulations will apply to all estate agents in the UK, including those in Scotland and Northern Ireland.

Period for keeping records

¹ Section 54 of CEARA 07: http://www.opsi.gov.uk/acts/acts2007/pdf/ukpga_20070017_en.pdf

Estate agents must keep permanent records for a period of at least six years from the date when each respective piece of information is included in the records. This is similar to the existing requirement for keeping records in relation to client money contained in the Estate Agents (Accounts) Regulations 1981.

The requirement to keep records will start when the record keeping requirements come into force. The requirement will not be backdated.

Employers and employees

The duty to keep records applies to employers (rather than employees), but employees are under a duty to ensure that prescribed information, events and actions are recorded by them, and included in their employer's records. Both employers and employees must keep records up to date. An employer will not be in breach of the duty to keep records if he can show that he took such steps as were reasonably practicable to ensure that his employees complied with their duty. Regulatory action can be taken against an employer for failing to keep records and to keep them up to date (subject to the defence above) and against an employee for failing to keep the records up to date.

Proposed start date

The Government proposes to bring into force the record keeping requirements on 6 April 2010. Final regulations and amended guidance will be available at least 3 months prior to introduction.

Estate Agents (Record Keeping) Regulations and guidance – views sought

We are seeking views on the draft record keeping regulations and draft guidance to the regulations prior to implementation. Comments on the regulations and guidance should be sent to the address below by 10 September 2009.

Enquiries

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2. The permanent records to be kept

The bulk of the records estate agents will be required to keep concern notices and information that estate agents are currently required to send to clients and third parties under EAA 79 and associated secondary legislation. Estate agents will also be required to keep records of specified information and actions in respect of each offer received (including details of offers not passed on to clients) and keep contracts agreed with clients and variations of such contracts.

Records of existing notices and information

Estate agents will be required to record and keep the following notices and information sent to clients and third parties (or, in the last case referred to below, to the estate agent):

- Notifications to clients setting out details of offers received from prospective buyers to purchase an interest in land, as required by paragraph 2 of schedule 3 of the Estate Agents (Undesirable Practices) (No 2) Order 1991.
- Information given to clients about their prospective liabilities to an agent, such as the fees and charges they will have to pay to an agent and the circumstances in which they are payable, before the client becomes committed to the agent, as required by sections 18(1) and (3) of EAA 79.
- Declarations to persons with whom an agent is to enter negotiations that the agent or a connected person has an existing or prospective personal interest in land, for example when an agent is buying or selling a property on behalf of a family member, as required by sections 21(1) and (2) of EAA 79.
- Declarations to clients that an agent or a connected person has, or is seeking to acquire, a beneficial interest in the land or in the proceeds of sale of any interest in the land in relation to which the agent is instructed, as required by paragraph 2 of Schedule 1 of the Estate Agents (Undesirable Practices) (No 2) Order 1991.
- General declarations to clients setting out the services offered by agents or connected persons or (where the agent or a connected person would derive a benefit) another person to prospective buyers, such as the provision of Home Information Packs or mortgages, as required by article 2 of the Estate Agents (Provision of Information) Regulations 1991. (Note that these Regulations were made under section 18(4) of EAA 79 and are therefore part of the information referred to in sections 18(1) and 21A(4)(a) of EAA 79.)
- Specific declarations to clients when a prospective buyer, who has been introduced to the client and has made an offer, has applied to use an estate agent's or connected person's or (where the agent or a connected

person would derive a benefit) another person's services (except where the application is refused) as required by paragraph 2 of schedule 2 of the Estate Agents (Undesirable Practices) (No 2) Order 1991.

- Declarations to agents by clients as to the type of offers they don't want to be notified about, such as those below a certain price or where a buyer does not have a mortgage in place, as referred to in paragraph 2 of schedule 3 of the Estate Agents (Undesirable Practices) (No 2) Order 1991.

Information and actions relating to offers

In addition to the requirements related to notifications listed above, estate agents will also be required to record and keep specific information and actions in relation to each offer received to purchase a property.

The definition of an 'offer' in the Estate Agents (Record Keeping) Regulations will be broadly similar to that set out in paragraph 3 of Schedule 3 of the Estate Agents (Undesirable Practices) (No 2) Order 1991, but with one significant difference. **The Record Keeping Regulations will extend the definition of an offer to cover offers of a type clients have declared that they don't want to be notified about (and agents are not required to pass on).** An agent's ability not to pass on unwanted offers will remain, but when the regulations come into force agents will be required to record and keep information and actions in relation to **all** offers received, including those they are not required to pass on. The aim of this change is to allow enforcers to check if an agent has acted in compliance with a client's instructions in not passing on an offer. Declarations by clients about the type of offers they don't want to see must also be recorded and kept (see above). Mere expressions of interest in a property, which do not state the amount offered, will not be required to be recorded.

The information and actions in relation to each offer that must be recorded are as follows:

- The amount of the offer to purchase a property
- Any conditions attached to the offer (for example subject to timing of sale, inclusion of certain goods etc)
- The name of the person making the offer (and of any person acting on behalf of the buyer)
- The name of the individual agent who receives the offer
- The date and approximate time the offer is received by the agent
- The means of communication (for example letter, email or telephone call) by which the offer is received by the agent
- The name of the individual agent who forwards the offer to the client (in the case only of offers which are required to be forwarded)
- The name of the individual to whom the offer is forwarded (ie the client or person receiving the offer on behalf of the client)
- The date and approximate time the offer is forwarded

- A copy of the letter or other written communication by which the offer is forwarded as required by the Estate Agents (Undesirable Practices) (No 2) Order 1991. (Note this is also one of the requirements listed in the section above.)
- Any instructions received from the client in relation to that offer (including for example any conditions attaching to any acceptance of the offer)

There will be no requirement to record and keep offers to sell a property ie where an offer to sell a property is passed to a prospective buyer for whom the estate agent is acting. This in line with the Estate Agents (Undesirable Practices) (No 2) Order 1991 which only requires details of offers to purchase a property to be sent to the client.

The amount of an offer will cover both cash and non cash offers, but only in relation to the interest in land. There will be no requirement to record offers for items not connected to the land, such as fittings.

There will be no requirement on agents to check or investigate conditions attached to offers (or responses to offers). Agents will simply be required to record conditions when applied.

The names of persons acting on behalf of buyers and sellers, such as solicitors or other agents, should be recorded if they make the offer to the agent or receive the offer from the agent and respond to it.

Much of this information will be contained in notifications sent to clients about offers received, but where the information is not recorded in this way, the agent must record and keep the information separately.

Contract documents

Estate agents will be required to keep the contracts they have agreed with clients and any variations of such contracts. This requirement is in addition to the requirement to record and keep information given to clients about prospective liabilities, before they become committed to an agent.

Where a contract is in standard form it should be clear, for example through signature and dating, that it relates to the relevant client. Where a contract is not in writing, the terms and conditions must be recorded in writing.

3. The manner in which permanent records are to be kept

Regulation 5 of the Estate Agents (Record Keeping) Regulations sets out the manner in which permanent records should be kept. The requirements apply to records kept under section 21A(4)(a) and (b) of EAA 79 and to those kept under the Regulations.

The policy aim is to enable enforcement officers to establish from records whether or not misconduct has occurred. They should be able to determine from a document when an action took place in order to validate a complaint.

Agents will be required to keep:

- original documents (contracts, letters, faxes, e-mails) in paper or electronic form² (e-mails); or
- true copies of original documents (photocopies, printed e-mails, electronic scans such as pdfs).

So, for example, when an offer is made by letter or email, the agent will be required to keep that letter or email or a copy of it.

Some information requirements (especially in relation to offers) will not be included in letters and e-mails, for example because the offer is made by telephone, so will have to be recorded separately in writing – perhaps in note or logbook form or on a computer using software to record transactions.

Records must be visible and legible, and where kept in electronic form, be able to be readily produced in a visible and legible form. They must also be in a form that can be taken away from the agent's premises and can be copied.

Records should show the date (and in the case of offers made to agents and then communicated to clients) the approximate time when the relevant information or action arose or took place eg when an offer letter was sent to a client. Entries in logbooks recording information and actions should be dated to show when the information was received and recorded eg when an offer was communicated to an agent. Communications sent electronically must be capable of being recorded and kept and show when they were sent.

Copies of documents must be 'true' and accurate copies. They should show the date a letter was sent and contain signatures where used.

We do not propose to set out the type of record keeping systems to be used by estate agents, specify auditing and ease of access requirements, or require that permanent records are kept separate from other documents. The duty to keep permanent records and provide them on request falls on the

² Where in the Estate Agents Act 1979 and relevant secondary legislation estate agents are required to send information "in writing", it is acceptable for agents to send information in paper or electronic form. Agents can therefore send e-mails to clients where they so wish.

agent and failure to do so, are 'triggers' enabling the OFT to consider the fitness of agents to operate.

There will also be no requirement on agents to back-up permanent records. Again the onus is on the agent to take appropriate steps to ensure that relevant records are kept for the required six year period. How they do this is a matter for them. Agents that fail to backup records, which are subsequently lost, will be in breach of the duty to keep permanent records.

4. The places in which permanent records are to be kept

Regulation 6 of the Estate Agents (Record Keeping) Regulations sets out the place or places that permanent records should be kept. The requirements apply to records kept under section 21A(4)(a) and (b) of EAA 79 and those kept under the Regulations.

The aim in specifying the place or places that records must be kept is to ensure that permanent records are easily accessible and enforcement officers know where they are kept.

Permanent records must be kept at the place of business most closely connected with the information or action to which the record relates, or in the case of records kept in electronic form, be readily available at that place of business. The term “place of business” applies to traditional estate agency branches, estate agents working from home or internet only operations.

In practice records kept in paper form should be stored at the relevant place of business, but records kept in electronic form can be stored off-site, provided they are easily accessible at the appropriate place of business.

Enforcement officers should be able to go to the branch associated with the transaction and inspect the records there and then without delay. They should not have to travel possibly hundreds of mile to a central store or depot. In the case of internet only agents with one place of business servicing the whole of the UK, they will have to liaise with locally based colleagues to access the records at that place of business.

Records should be kept at the relevant place of business for six years, even when employees or partners who originally handled the records have moved on – an employee who leaves a business cannot be held responsible for the records left behind or be required to take them with them.

When a branch is relocated or closed down, the records should be moved to the nearest practicable place of business to the original place of business. The same should also happen in the case of a takeover.

5. Enforcement

When the record keeping provisions in EAA 79 are commenced, breaches of the record keeping requirements (in both the Act and the Regulations) will become triggers enabling the OFT to consider the fitness of estate agents to operate. Failure to keep permanent records could result in a warning or prohibition order banning an agent from carrying out estate agency work.

Failure to provide information requested by the OFT under section 9(1) and an authorised (enforcement) officer under section 11(1A)(b) of EAA 79 are already triggers enabling the OFT to consider the fitness of estate agents to operate.

Enforcement officers are able to enter premises and inspect documents when they have reasonable cause to suspect that an offence under EAA 79 has been committed, that a specified breach of EAA 79 has occurred, or the agent has engaged in an 'undesirable practice'.

It is an offence to wilfully obstruct or impersonate an enforcement officer. Upon conviction, a person guilty of obstruction is liable to a fine not exceeding level 4 (currently £2,500) and a person guilty of impersonation to a fine not exceeding level 5 (currently £5,000).