

Guidance on Canada's Anti-Spam Legislation (CASL) for REALTOR® Members

Guidance on CASL for REALTOR® Members

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Guidance on CASL for REALTOR® Members

1. Introduction

This resource has been developed by The Canadian Real Estate Association (CREA) as a service to REALTOR® members to make compliance with Canada's Anti-Spam Legislation (CASL) easier. It aims to help REALTOR® members understand the requirements of CASL and how it applies to commercial electronic messages (CEMs) with members and non-members. The final section of this document provides guidance on the application of CASL to the installation of computer programs and apps.

When CASL was introduced in 2009, Canada was the only G-8 Country without an anti-spam framework. In this context, implementation was a matter of when, and not a question of if. CREA's goal at the outset was to preserve critical electronic marketing practices and to significantly and substantively ease the compliance burden for CREA's members.

Over four and a half years of persistent lobbying by CREA and REALTOR® members carved out nine significant changes that will make it easier for Boards and Associations and REALTOR® members to maintain and build relationships under CASL. Detailed information about these provisions in CASL is found later in this publication, but a summary of those nine changes is as follows:

1. CEMs can be sent to follow-up on third-party referrals as long as the person making the referral has a relationship with the recipient and certain information is included in the CEM.
2. A transitional provision allows members to send CEMs to certain recipients without express consent for three years, provided certain conditions are met.
3. The amount of time during which a CEM can be sent to a client without express consent after a sale was extended by an additional six months to 24 months total.
4. A CEM can be sent to follow up after exchanging contact information with the recipient, for example after exchanging information at a networking event, so long as the message is relevant to the recipient's business.
5. Express consent to send CEMs can be obtained orally or in writing. Prior to CREA's lobbying efforts consent could only be acquired in writing.
6. Requests for consent to send CEMs only need to include basic contact details about the sender. Prior to CREA's lobbying efforts, requests for consent had to contain a tremendous amount of information about the sender.
7. A requirement to have a website in order to send a CEM was removed.
8. The regime's unsubscribe requirement was significantly streamlined. Senders of CEMs only need to provide a single functioning unsubscribe mechanism to consumers.
9. The private right of action in the legislation, which allows consumers to take legal action against those who violate the act or regulations, has been delayed by three years. This removes initial uncertainty about how this measure may be applied, particularly against those who mistakenly contravene the law.

Please note this manual is compiled based on the best information available to CREA. It should not be construed as legal advice. In the case of any uncertainty, it is important to obtain legal advice.

1.1. What is CASL

Canada's Anti-Spam Legislation (CASL) is a law that regulates how you can send email, text messages and other forms of electronic messages, and how you can use certain applications (Apps) for marketing purposes. The federal government passed the law in an effort to reduce spam, malware, and related internet threats.

CASL establishes three primary rules for sending CEMs: 1) senders must have consent from the recipient of the message before sending a CEM; 2) senders must provide proper identification and contact information to the recipient in each CEM; and, 3) senders must have a functioning unsubscribe mechanism in their CEMs.

Complying with CASL means there are five questions you should ask yourself before sending an electronic message:

1. Is the message a CEM?
2. Is the CEM subject to CASL?
3. Is there consent to send the CEM?
4. Does the CEM contain the required information?
5. Does the CEM contain an unsubscribe mechanism?

The rule with respect to computer programs and Apps is straight-forward: express consent must always be obtained before a computer program or an App is installed.

CASL passed Parliament in December 2010, and the provisions regarding the sending of CEMs will come in to force on July 1, 2014. The provisions regarding the installation of an App or a computer program will come into force January 15, 2015. CREA's lobbying resulted in a three year delay of the private right of action, which removes initial uncertainty about how this measure may be applied against senders of CEMs, particularly those who mistakenly contravene the law. These provisions will come into force on July 1, 2017. Once the law is in force, REALTOR® members will have to comply with all of the rules under the law.

1.2. Why is it important to comply?

CASL contains significant penalties for non-compliance. The Canadian Radio-television Telecommunications Commission (CRTC) can impose fines of up to \$10 million per violation; e.g., for each email sent or App installed in violation of the legislation. Although subject to a three year delay, a private right of action in the law also allows any person who receives an email sent contrary to the rules to sue the sender. This means a recipient of unwanted messages can sue for actual damages, as well as statutory damages of up to \$200 per violation. While \$200 may not seem like a lot, it can quickly add up if the recipient has received a large number of unwanted messages from a single sender. Furthermore, class actions lawsuits could be brought if there are many individuals who have received the same message. The owner of a device can sue for statutory damages of up to \$1 million for the installation of a computer program or an App in violation of the law.

2. Application of CASL

2.1. What is a CEM?

The law applies to CEMs. There are two key components to the definition of a CEM: it must be an **electronic message** and it must be **commercial**. An **electronic message** includes email, SMS text messages, instant messages, and any form of electronic messaging that is sent to an electronic account. This would include private messages sent through social media platforms such as LinkedIn or Facebook. However, a post on Twitter or one's own Facebook page would not be an electronic message because it is not sent to an account, such as an email address. The law also does not apply to live or recorded voice or fax messages.

A message is considered **commercial** if it is reasonable to conclude that it is intended to encourage participation in a commercial activity. This includes messages that promote a product, a service, a business opportunity, or any person who does any of those things. This would include a CEM with information about a REALTOR® member, even if it does not explicitly promote the services of that REALTOR® member. Any links included in a message - such as a link to a website of a REALTOR® member - are to be taken into consideration in determining whether the message is commercial.

The following are examples of content in a message that would likely be considered "commercial":

- information about a listing or open house;
- the sales record of a REALTOR® member;
- asking an individual if they are interested in buying or selling a property.

The following are examples that would likely not be considered "commercial":

- a message that delivers a standard form;
- a message to a client or colleague that discusses only personal matters.

A message sent specifically for the purposes of obtaining consent, even if it does not contain any commercial content, is also deemed to be a CEM. In other words, an electronic message sent without consent cannot be used to obtain consent.

2.2. CEMs Subject to CASL

It is a violation of CASL to send a CEM to an electronic address unless the recipient has consented to receive the CEM and the CEM contains the required information. However, there are some exceptions to this requirement.

Messages sent between individuals that have a family or personal relationship are exempt from the legislation. A family relationship is defined as one where the sender and recipient of the message are related to one another through a marriage, common-law partnership or any legal parent-child relationship and those individuals have had direct, voluntary, two-way communication. A personal relationship is defined as one where the sender and the recipient of the message have had direct, voluntary, two-way communications and it would be reasonable to conclude that they have a personal relationship, taking into consideration any relevant factors

such as the sharing of interests, experiences, opinions and information evidenced in the communications, the frequency of communication, the length of time since the parties communicated or whether the parties have met in person.

The law also does not apply to messages that solely relate to a real estate transaction, such as an email sent to an existing client providing a copy of an offer of purchase. That said, CASL would apply to these emails if the message also contained "commercial" content; e.g., advertising about the services of the REALTOR® member.

Moreover, messages sent for the following purposes are also exempt from CASL:

- In order to inquire about or apply for a product or service, (i.e., a message sent from a consumer to a REALTOR® member);
- To respond to an inquiry or complaint about a product or service;
- That are communications among employees of an organization;
- That are communications between employees of two organizations that have a relationship (e.g., between two brokerages that are cooperating on a sale);
- To deliver a product, good or services; or
- To enforce a legal right.

All CEMs sent by REALTOR® members that do not qualify for these exemptions must comply with CASL, which means the messages must contain the required information and the REALTOR® member must ensure there is consent before sending the messages.

3. Consent

There are two forms of consent under CASL: **implied** and **express**.

3.1. Implied consent

There are five different circumstances where consent can be implied from a potential recipient (i.e., a CEM can be sent by a REALTOR® member without explicitly asking for permission):

- Following Up on a Referral;
- Existing Business Relationships;
- Existing Non-Business Relationships;
- Conspicuous Publication of Electronic Address; and
- Disclosure of Electronic Address by Recipient to a REALTOR® member.

3.1.1. Following Up on a Referral

Referrals are a common method of business development for REALTOR® members. In a typical referral scenario, an individual will provide to a REALTOR® member an email address or telephone number of a friend, family member, or colleague who may be in need of services of the REALTOR® member. The REALTOR® member will then contact that person.

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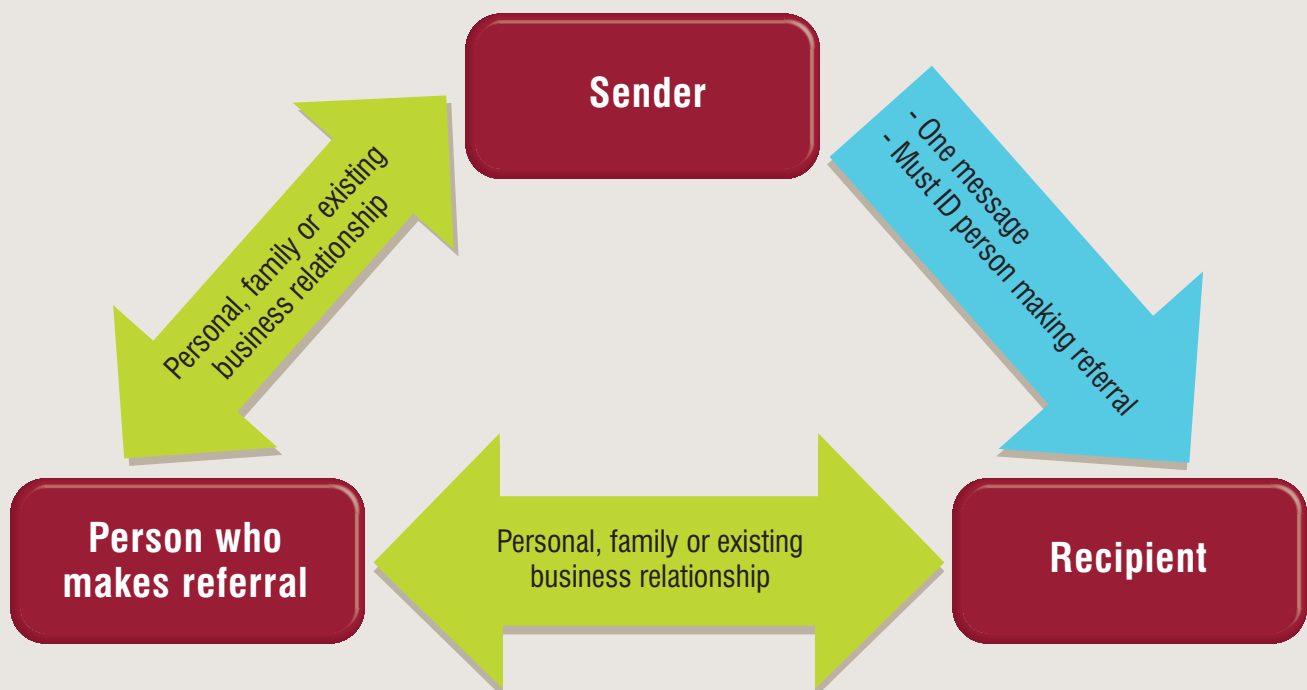
This circumstance for implied consent was incorporated into the CASL regulations as a result of lobbying by CREA. There are specific rules for the use of CEMs to follow up on referrals that must be adhered to in order to avoid sending a CEM without consent in contravention of the legislation. The first CEM sent to follow up on a referral is exempt from CASL if:

- the individual who made the referral has a family relationship, personal relationship, or an existing business relationship (explained below) with both the REALTOR® member who sends the message and the person to whom the message is sent; and
- the REALTOR® member who sends the message discloses in the message the name of the person who made the referral.

The diagram below provides a graphical depiction of the relationships between parties under the referral exemption.

If a CEM sent to follow up on a referral meets these requirements then consent to send the CEM is implied.

FIGURE 1: Relationships between parties under the referral exemption



3.1.2. Existing Business Relationship

An existing business relationship arises where the REALTOR® member and the recipient have done business together in the **two years** before the message is sent. Examples of "doing business" include a purchase of property by the recipient from the REALTOR® member, or a contractual relationship that ended within the past two years. An existing business relationship also exists where the recipient has made an inquiry about the services of a REALTOR® member within the past six months. A CEM may be sent based on an existing business relationship until the time that the six month or two year time period expires, whatever the case may be.

Examples of implied consent based on an existing business relationship:

- A REALTOR® member has a listing agreement with an individual. The REALTOR® member can send a CEM to that individual up to two years after the agreement expires.
- An individual has sent an email to a REALTOR® member inquiring about their services or asking for information about a property or listing. The REALTOR® member has up to six months to follow up with a response by email.

3.1.3. Existing Non-Business Relationship

A non-business relationship exists where the sender: (a) is a charity, political party or political candidate, and the recipient has volunteered or made a donation within the previous two years; or (b) is a club, association, or volunteer organization of which the recipient has been a member within the previous two years. A good example of when this circumstance would apply is where a Board sends a message to its members that advertises products and services available for purchase. Boards and Associations have implied consent to send REALTORS® CEMs as a result of their membership in those organizations.

3.1.4. Conspicuous Publication of Electronic Address

Consent may be implied if the recipient has conspicuously published their electronic address (e.g., on a website), has not expressly stated that they do not wish to receive unsolicited messages, and the content of the message is related to the recipient's business or official capacity. This form of consent is more relevant in a business-to-business context. It is difficult to rely on this form of consent to send a CEM to an individual who may be interested in buying or selling because the purchase or sale of a home is unlikely to be related to that individual's business or official capacity.

It is also important to be aware that a REALTOR® member cannot use computer programs to collect electronic addresses that are published on the internet, as this is a contravention of the *Personal Information Protection and Electronic Documents Act* (PIPEDA).

Example of implied consent based on conspicuous publication:

- A REALTOR® member has a listing that they are looking to promote. They find a web site with an email address for another REALTOR® member who may have

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clients who are interested in that listing. The first REALTOR® member uses the email address published on the website to contact that second REALTOR® member.

3.1.5. Disclosure of Electronic Address by Recipient to a REALTOR® Member

Consent may be implied if the recipient has disclosed their electronic address directly to the sender, has not expressly stated that they do not wish to receive unsolicited messages, and the content of the message is related to the recipient's professional capacity. For example:

- A representative of a property management company provides their business card to a REALTOR® member that includes the representative's email address. The representative does not indicate that they do not wish to be contacted with unsolicited commercial electronic messages. The REALTOR® member emails the representative to ask if they need an agent to list their properties.

On the other hand, implied consent does not apply in the following circumstance:

- An individual provides their business card to a REALTOR® member that includes the individual's email address. The REALTOR® member cannot rely on implied consent to contact that person about selling their personal home, as it is not related to that person's official or business capacity.

3.1.6. Transitional Provision for Implied Consent

CASL contains a transitional provision that extends the time period during which consent to send a CEM can be implied up to July 1, 2017, if:

- there has ever been an existing business relationship or existing non-business relationship in existence between the REALTOR® member and recipient before July 1, 2014, without regard for the expiry dates associated with the various types of relationships; and
- there has been communication by CEM between the REALTOR® member and the recipient (e.g., the REALTOR® member has been sending updates or newsletters by email).

This means that if an existing business relationship or non-existing business relationship has existed at any time prior to July 1, 2014, and the REALTOR® member and recipient have communicated through electronic communications, then consent is implied until July 1, 2017, unless the recipient unsubscribes.

For example, a REALTOR® member is considered to have implied consent to continue sending emails to the individual until July 1, 2017 if:

- A REALTOR® member represented an individual in the past, and the individual has been receiving weekly email newsletters from the REALTOR® member.
- An individual contacted a REALTOR® member to inquire about their services or a property listing, and the REALTOR® member and the individual maintained contact through email.

You can use this three-year window to send a CEM to obtain express consent, which would close after July 1, 2017. It is important to note that normally an email sent to obtain consent would be considered a CEM itself, which means the sender would have to have consent before sending the email in order to comply with CASL. However, if express consent is sought in an email sent during this transitional period, then consent is implied for that CEM.

Many REALTOR® members have existing databases of email and/or other electronic addresses. One way to ensure that REALTOR® members can continue to send emails to these addresses is to send a message to request consent before CASL comes into effect on July 1, 2014. Alternatively, if the REALTOR® member has an existing business or non-business relationship with the owners of the email addresses, then the REALTOR® member can take advantage of the three-year transitional provisions and send an email to obtain consent during that period.

Once CASL comes in to force, it will be important to stop sending CEMs to anyone who has not provided consent in accordance with the law or who does not provide consent when consent is sought using the transitional provisions.

3.1.7. Tips for compliance

- An existing business relationship is the most relevant form of implied consent for contacting individual clients. It may allow you to contact individuals you have done business with in the past. However, an existing business relationship is time-limited, meaning that it should be used as an opportunity to obtain express consent. Express consent does not expire unless consent is withdrawn.
- If relying on an existing business relationship or existing non-business relationship, it is important to keep track of the varying "expiry dates" that arise under the different categories of implied consent (six months or two years).
- The transitional provision described above will allow REALTOR® members to imply consent to send CEMs where there is an existing business relationship or existing non-business relationship and the REALTOR® member has sent emails to the recipient previously.
- Implied consent based on the conspicuous publication of an electronic address, or where the recipient has provided their electronic address to the sender, is likely only relevant for business-to-business communications (e.g., contacting another REALTOR® member, or contacting a business owner about a commercial property) because of the requirement that the message be relevant to the recipient's official or business capacity. Before relying on this form of consent, it is important to be sure that the recipient has not indicated that they do not want to be contacted.

3.2. Asking for express consent

If consent cannot be implied, then express consent is necessary. Express consent means that the recipient has affirmatively indicated to you that they would like to receive a CEM in response to a request for consent.

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If consent cannot be implied and if express consent is not obtained it is important not to send the CEM or doing so will violate the legislation.

There are a number of things that must be taken into consideration when seeking express consent.

3.2.1. Information to be Included in a Request for Consent

- **Purpose.** CASL requires you to clearly explain the purpose for requesting consent. Be as specific as possible, and tell the individual what they will be hearing about, and from whom. For example, tell the individual if they will be added to a newsletter, or if you simply plan to reach out to them in the future with listings that match their interests. Furthermore, it is essential to be clear about who they will be hearing from (e.g., from you, your brokerage), and whether their address will be shared with anyone else. A failure to explain any of this information could result in a finding that consent was not properly obtained.
- **Identifying information.** CASL specifically requires that certain identifying information be provided when asking for consent. This information must be set out "clearly and prominently", meaning that it must be easily read. The required information is as follows:
 - The name of the person requesting consent (or the name by which the person carries on business). In many cases this will be the name of the REALTOR® member.
 - If one person is asking for consent on behalf of another, then both of those persons need to be identified, and the individual needs to be told on whose behalf consent is sought. For example, if a brokerage is asking for consent on behalf of one or more REALTOR® members, then this needs to be explained to the individual.
 - Contact information for either the person requesting consent or the person on whose behalf consent is sought must be provided, including a physical address (typically the mailing address of the brokerage), and either a telephone number, email address, or web address.
- **Withdraw of Consent:** The person providing must be informed that they can withdraw their consent (i.e., unsubscribe) at any time.

3.2.2. Form of Consent

Express consent can be obtained electronically, in writing, or verbally.

- **Electronically:** Consent can be obtained electronically, for example, through a website. This often involves the use of a check box. The CRTC has indicated that consent must be **opt-in**, not **opt-out**, meaning that check boxes **cannot** be pre-checked. If the individual is required to actively enter their email address specifically for the purposes of subscribing to a list, then a separate check box is not required. **Figure 2** provides an example of a compliant request for consent because the individual is required to actively click the check box next to the statement requesting consent.

Figure 3 below provides an example of a compliant request for consent where the individual is required to enter their email address next to a statement requesting consent.

- **In writing:** Consent can be obtained in writing, for example, on a form at an open house. The same requirements that apply to an electronic request for consent apply to a request in writing.
- **Verbally:** Consent can be requested and provided verbally. All of the information that is required when obtaining consent electronically or in writing (i.e., purpose and identification) must be provided in a verbal request for consent as well.

FIGURE 2: Example of a compliant request for consent with an unchecked check box.

- ☐ I would like to receive emails from [NAME OF REALTOR® MEMBER] about properties and listings in my area. Consent can be withdrawn at any time by clicking the "unsubscribe" link contained in the email.

[NAME BY WHICH REALTOR® MEMBER CARRIES ON BUSINESS], 123 Windy Lane, Toronto, ON, A1A 1A1. abcd@mywebsite.com.

FIGURE 3: Example of a compliant request for consent where individual is required to enter their email address.

Enter your email address below to receive emails from [NAME OF REALTOR® MEMBER] about properties and listings in your area. Consent can be withdrawn at any time by clicking the "unsubscribe" link contained in the email.

Enter email address

SUBMIT

[NAME BY WHICH REALTOR® MEMBER CARRIES ON BUSINESS], 123 Windy Lane, Toronto, ON, A1A 1A1. abdy@mywebsite.com.

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A request for consent cannot be subsumed or 'buried' in a larger agreement, such as an end-user license agreement or privacy policy. The request must be separate from these agreements, and brought to the specific attention of the recipient. Furthermore, the CRTC has stated that a recipient must be able to agree to general terms of use or sale without being required to consent to receiving a CEM.

The following is an example of a form that REALTOR® members can use to seek express consent (for example, at an open house) and which satisfies all of the elements described above:

FIGURE 4: Example request for express consent form.

Sign up to our newsletter

Provide your email address below to sign up for my monthly email newsletter for information about new listings, market statistics, and informative articles about buying and selling a home. Consent can be withdrawn at any time by clicking the "unsubscribe" link contained in the email.

Email address: _____

[NAME BY WHICH REALTOR® MEMBER CARRIES ON BUSINESS], 123 Windy Lane,
Toronto, ON, A1A 1A1. abdy@mywebsite.com.

3.2.3. Confirmation Message

The CRTC has noted that they expect businesses to send a "confirmation" message following the receipt of consent. The confirmation message reminds the individual that they have provided consent, and offers an opportunity to opt out. This is often referred to as "notified opt in". Please note that this is not a requirement of the CASL legislation, but has been recommended as a best practice by the CRTC.

3.2.4. Existing express consent obtained in compliance with PIPEDA

If you obtained express consent from someone before July 1, 2014 in a manner that is compliant with the *Personal Information Protection and Electronic Documents Act* (PIPEDA), then that consent is also considered compliant with CASL. This means that you would not need to seek express consent again from that person for the purposes of sending email or other electronic messages under CASL.

Express consent for the purposes of PIPEDA is generally similar to express consent under CASL, with a couple of key differences. First, PIPEDA does not necessarily require you to provide all of the same information required when requesting consent under CASL, such as a mailing address, and either a telephone number, web address or email address.

Second, while the CRTC has stated that pre-checked boxes are not acceptable under CASL, pre-checked boxes are acceptable under PIPEDA where non-sensitive personal information is involved. For example, the collection and use of an email address to send real estate-related information would generally be considered non-sensitive information. In this case, a pre-checked box could be used. By contrast, medical or financial information about a person is considered sensitive information, and a pre-checked box may not be an acceptable manner for obtaining express consent to collect such information.

3.3. Evidence of consent

Any person claiming to have consent under CASL bears the burden of proving that consent was properly obtained if he/she becomes subject to an investigation or lawsuit. It is therefore important for you to maintain a record of when and how consent was obtained. For example, when consent is obtained electronically on a website, a “screen shot” of the site and a log should be retained in a database along with a record of the date, time, and purpose of consent. While there are no prescriptive rules for exactly what constitutes proper evidence under CASL, you should be able to feel comfortable that you could prove that a person provided consent if they ever tried to argue otherwise.

It will likely be more difficult to prove that consent was obtained verbally, which should be taken into consideration when seeking express consent.

4. Information to be Included in a CEM

Once consent has been obtained (whether express or implied), REALTOR® members must ensure that any CEM they wish to send satisfies two additional requirements: the sender must be properly identified in the message; and, each message must contain a functioning unsubscribe mechanism.

4.1. Identification

Every CEM must contain prescribed identification information. The required information is as follows:

- The name of the person sending the message (or the name by which the person carries on business). In many cases this will be the name of the REALTOR® member.
- If one person is sending the message on behalf of another, then both of those persons must be identified by name, and the message must indicate who is sending on behalf of whom. For example, if a REALTOR® member sends an email that promotes the services of a staging company, then the REALTOR® member could be seen as sending the email on behalf of the staging company.
- Contact information for either the person sending or the person on whose behalf the message is sent must be provided, including a physical address, and either a telephone number, email address, or web address.

This information must be set out "clearly and prominently". CASL does not specify what this means; however, the information must be readily viewable by the recipient, with no attempt to hide or deceive. As an example, very small font, and font colours that are not easily distinguishable from the background should be avoided. Many email service provider systems (e.g., systems that allow you to send large quantities of email) allow you to enter this information into a template that is automatically included in the "footer" of the emails you send through that system.

If the required identification information described above cannot be practically included in a message, then it is acceptable to include the required information in a link to a web page that is set out clearly and prominently in the message. This could be used, for example, if sending an SMS text message, which is limited to 140 characters.

4.2. Unsubscribe

Every message must contain a functional unsubscribe mechanism. An unsubscribe mechanism allows a recipient to easily withdraw consent from receiving any messages in the future. There are a few key requirements that apply to the unsubscribe mechanism:

- **Form:** The unsubscribe mechanism must use the same electronic means by which the message is sent, unless impracticable. For example, if the CEM is an email, then the recipient should not be required to unsubscribe by telephone. A CEM must allow the recipient to unsubscribe either by sending a message to an electronic address (e.g., replying to an email with "Unsubscribe" in the subject line), or by clicking on a link to an unsubscribe web page. The unsubscribe mechanism must be able to be "readily performed", meaning that it must not be too onerous for the recipient. For example, it would be too onerous to require a user to log into an account in order to unsubscribe. Web pages that allow users to select from a number of options when unsubscribing (e.g., a "preference centre") are acceptable. The unsubscribe mechanism must be functional for at least 60 days after a CEM is sent.
- **Time to give effect:** An unsubscribe request must be given effect "without delay, or in any event no longer than 10 business days". This means that every effort should be made to ensure that a user will not receive any CEMs after an unsubscribe request is made, unless extenuating circumstances make this impossible. Once an individual has unsubscribed, do not follow-up with any messages asking the recipient to re-subscribe. Receiving messages after an unsubscribe request has been made is one of the most common causes of spam-related complaints.
- **Cost:** The unsubscribe mechanism must be free of charge.
- **Specific considerations for SMS Messages:** An SMS message must provide the recipient with the choice between replying to the message with the word "STOP" or "Unsubscribe" or clicking on a link that will take the user to a web page where he or she can unsubscribe.

4.2.1. Tips for Compliance

- Except in cases where very small numbers of CEMs are sent, it is generally preferable that the unsubscribe mechanism be automated. There are many products and services that enable automated email list management and unsubscribe mechanisms. For example, email service provider systems provide unsubscribe mechanisms that will automatically remove recipients from your list when they unsubscribe.

- Web-based unsubscribe pages are often more reliable than unsubscribe requests sent to an electronic address, as this removes the risk that an unsubscribe request will be caught in a spam filter. Also, a web-based unsubscribe page - sometimes referred to as a "preference center" - allows a sender to provide the recipient with more options beyond unsubscribing altogether. For example, a recipient can be given the option to choose which types of information they would like to receive, or change the frequency with which they receive messages (i.e., "opting down").

5. Strategies for Obtaining Electronic Addresses

A database of electronic addresses is a valuable marketing tool that allows a REALTOR® member to effectively maintain contact with past, existing, and future clients and business contacts. This section provides practical guidance respecting common practices used for obtaining electronic addresses and practices that should be avoided.

5.1. Open Houses

An open house - or any other event - offers an opportunity to collect electronic addresses from attendees. Given the challenges with recording evidence of express consent obtained verbally, it is preferable to collect contact information in writing either on a form or on a computer provided specifically for that purpose. This allows a REALTOR® member to provide all of the required information and to retain a record that consent has been properly obtained.

The exchange of business cards is also an effective way to collect contact information. Note that when a recipient provides their business card to a sender, the sender can rely on implied consent to send a CEM, but only if the CEM is related to the recipient's business or official capacity. As such, the exchange of a business card without obtaining express consent is really only effective for business-to-business type communications. If a person provides their business card with the intention of having you use their business email address to reach them for reasons *unrelated to their* business, you need to obtain their express consent to do so by following the steps identified above.

5.2. Landing Pages

Landing pages are commonly used to attract traffic online and obtain prospects. A landing page may offer an article, report, or webinar, in exchange for the user's contact information. This can be an effective collection strategy; however, be sure to include all of the required information in a request for consent (i.e., your name, contact information, purpose for the consent, and a statement about the ability of the recipient to withdraw consent).

If you are selling a product or service (e.g., an upgraded advertising package), then you cannot require a person to consent to receiving CEMs as a condition of purchasing that product or service. In other words, they must be able to purchase the product or service without being required to provide consent.

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5.3. For Sale by Owner Listings

Whether a REALTOR® member may contact an owner selling their own property will depend on the purpose of contacting the seller. A REALTOR® member may use an electronic address on the listing to contact the seller if they are doing so on behalf of a client who may be interested in purchasing the property, so long as the listing does not specify "no agents". In this case, the communication is exempted from the legislation because the REALTOR® member is inquiring about a house being offered for sale by the owner. However, a REALTOR® member cannot use an electronic address on the listing to offer to represent the seller, as the REALTOR® member is offering his or her services, and there is neither an exemption nor implied consent for this type of communication.

5.4. Exemption for Referrals

As is explained above, consent is implied for a single message sent to follow up on a referral. REALTOR® members must ensure there is implied consent or express consent to send any further emails to the same recipient. Therefore, it might be a good idea to use the single message sent to follow up on a referral as an opportunity to request express consent to send further CEMS. If the recipient does not reply, then no further messages can be sent.

6. Practices to Avoid

6.1. List Purchase

There are companies that offer lists of email addresses for sale. These lists are often marketed as fully "opt-in", "permission-based" or "compliant". Purchasing such a list may be tempting but is very risky. Despite advertised claims, it is unlikely that proper consent has been obtained, and anyone purchasing and sending to such a list is mostly likely doing so in violation of CASL. In addition, it is also a violation of privacy legislation to buy and sell a list of email addresses without the consent of everyone whose email is on the list.

There are circumstances where the purchase and sale of a list of email addresses may be done in compliance with CASL and privacy legislation. For example, if a list is an asset that is sold as part of the purchase and sale of a real estate practice, then it might be used in way that is consistent with the obligations under CASL. These situations are complex and it is recommended that you consult with legal counsel to ensure that the requirements under CASL and privacy legislation are properly addressed when purchasing or selling a real estate practice.

6.2. Email Appending

Email appending generally refers to the practice of attempting to add email addresses to an existing database of contact information by merging two separate databases. There are many companies that offer such a service. This practice should be avoided as the use of email addresses obtained through an email appending service would be without consent, and therefore very likely to result in the sending of emails that are not compliant with CASL.

7. Installation of Apps

It is a violation of CASL to install a computer program on a computer without the consent of the computer owner. The definition of “computer program” includes many different things, most importantly to REALTOR® members being applications (Apps), which is why this section focuses on Apps instead of computer programs more broadly. However, it is important for REALTOR® members to know that CASL applies to computer programs in general. It should also be noted that consent is implied for the installation of certain “computer programs”, such as operating systems and HTML code.

Apps can be a valuable marketing tool for REALTOR® members. CASL requires that before an App is installed on a device that the authorized user (i.e. the owner) of the mobile device expressly consents to install the App. The following describes how a REALTOR® member should design his/her App so as to properly seek express consent from the owner of a mobile device

7.1. Obtaining Express Consent

Express consent means that the owner of the mobile device has affirmatively indicated his/her consent to the installation of the App in response to a request for consent. In order to obtain express consent REALTOR® members should design their Apps with the following three rules in mind:

- Provide the required information to the user when obtaining consent from him/her;
- Make sure that the format of the consent is in the proper format;
- Comply with any additional requirements for those Apps that require special treatment as they perform specified functions.

7.1.1. Information to be provided

CASL requires that *before* an App is installed on a mobile device the following information be provided to the owner of the mobile device:

- **Purpose.** CASL requires you to clearly explain the purpose for requesting consent. For example, inform the user that they are consenting to the installation of an App on their device.
- **General description of the App:** A REALTOR® member must clearly and simply describe, in general terms, the function and purpose of the App. This would include, for example, notifying the individual if the App will make use of location-based functionality on the device (i.e., GPS).
- **Identifying information.** CASL specifically requires that certain identifying information be provided when asking for consent. This information must be set out “clearly and prominently”, meaning that it must be easily read. The required information is as follows:
 - The name of the person requesting consent (or the name by which the person carries on business). In many cases this will be the name of the REALTOR® member.
 - If one person is asking for consent on behalf of another, then both of those persons need to be identified, and the individual needs to be told on whose behalf consent is sought. For example, if a brokerage is asking for consent on behalf of several REALTOR® members, then this needs to be explained to the individual.

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- Contact information for either the person requesting consent or the person on whose behalf consent is sought must be provided, including a physical address, and either a telephone number, email address, or web address.

7.1.2. Form of consent

Express consent for the installation of an App must be in the proper format. Such consent will typically be obtained electronically through the website or platform where the App is downloaded by the individual. Consent must be **opt-in**, not **opt-out**, meaning that the user must be required to explicitly click on a check box or icon indicating that they provide express consent. Check boxes **cannot** be pre-checked.

A request for consent cannot be subsumed or 'buried' in a larger agreement, such as an end-user license agreement or privacy policy. The request must be separate from these agreements, and brought to the specific attention of the recipient. Consent for receiving CEMs and the installation of an App must be obtained separately; i.e., a user cannot be required to consent to receiving CEMs as a condition of consenting to the installation of an App, and vice versa.

7.2. Additional Requirements for Specified Functions

Additional requirements apply if an App performs certain specified functions, causing the App or mobile device to perform in a manner that would be contrary to the reasonable expectations of the user. For example, if the App:

- collects personal information from the device;
- interferes with the user's control of the device;
- changes or interferes with settings, preferences or commands on the device without the user's knowledge;
- causes the device to communicate with another computer without the user's knowledge;
- changes or interferes with data that is stored on the device in a manner that obstructs, interrupts or interferes with lawful access to or use of that data; or
- allows another third party to install a program on the device without the user's knowledge.

These functions must be brought to the explicit attention of the user, and separate express consent must be obtained for each of these functions in addition to express consent obtained for the installation of the App.

Furthermore, if the App performs any of the functions described above, the user must be provided with an electronic address where they can request assistance in having the App removed. The ability to seek this assistance must be active for a period of one year following the installation of the App.

8. Resources

Legislation and Regulations

An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act S.C. 2010, c. 23 (Canada's Anti-Spam Legislation)

[http://lois-laws.justice.gc.ca/eng/AnnualStatutes/2010_23/FullText.html]

Electronic Commerce Protection Regulations (CRTC), SOR/2012-36

[<http://laws-lois.justice.gc.ca/eng/regulations/SOR-2012-36/page-1.html>]

Electronic Commerce Protection Regulations (Industry Canada), 81000-2-175 (SOR/DORS)

[<http://fightspam.gc.ca/eic/site/030.nsf/eng/00273.html>]

Canadian Radio-television and Telecommunications Commission Interpretive Guidance

Guidelines on the interpretation of the Electronic Commerce Protection Regulations (CRTC), Compliance and Enforcement Information Bulletin CRTC 2012-548

[<http://www.crtc.gc.ca/eng/archive/2012/2012-548.htm>]

Guidelines on the use of toggling as a means of obtaining express consent under Canada's anti-spam legislation, Compliance and Enforcement Information Bulletin CRTC 2012-549

[<http://www.crtc.gc.ca/eng/archive/2012/2012-549.htm>]

Other

Industry Canada website on Canada's Anti-Spam Legislation

[<http://fightspam.gc.ca/eic/site/030.nsf/eng/home>]

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NOTE

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

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