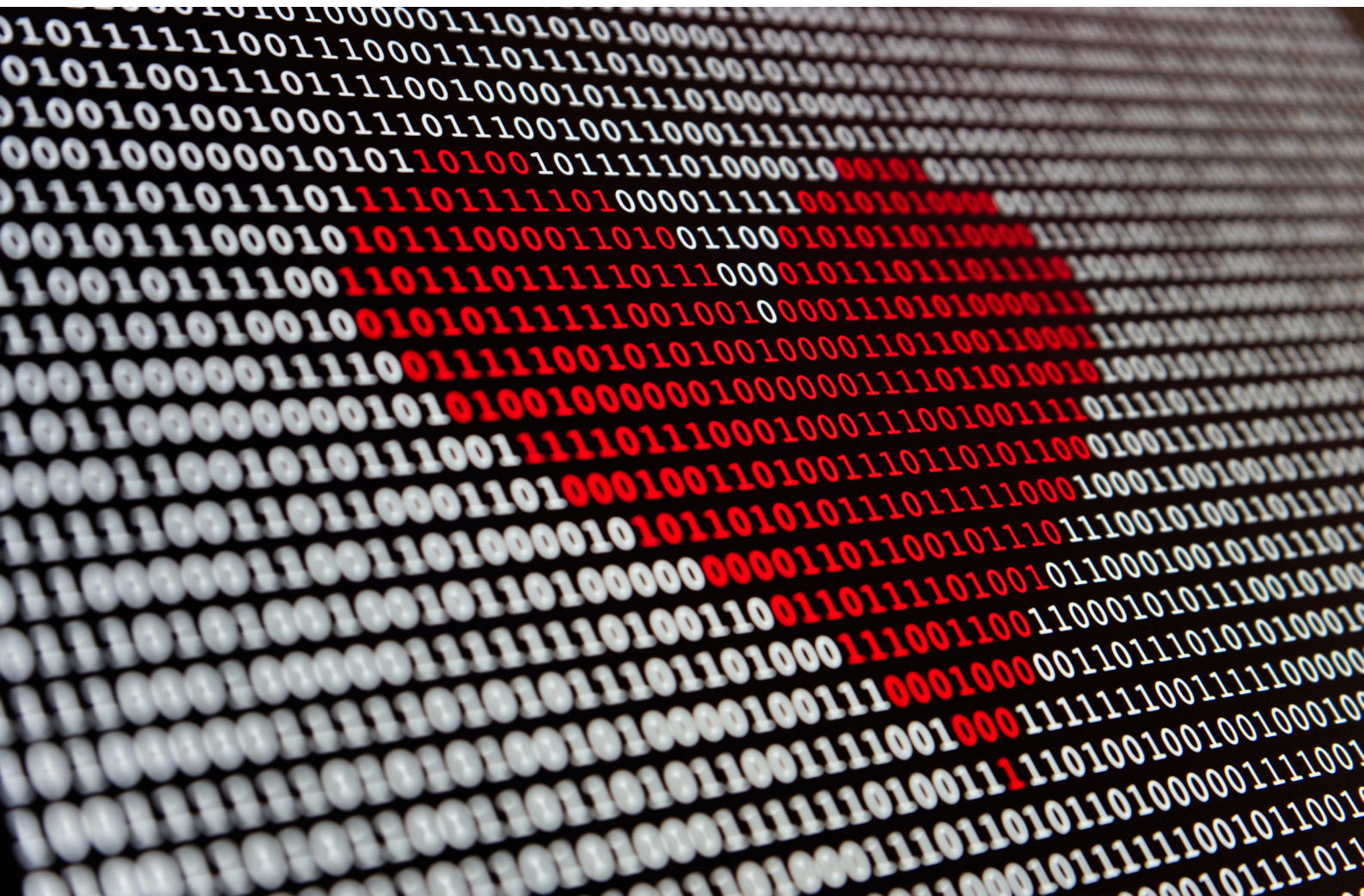




Beyond COVID-19:
Data protection and reopening the
property market



Contents

1	Introduction	1
2	Current government guidance	2
3	Processing data about COVID-19 symptoms lawfully	3
4	Legal bases	4
4.1	Processing staff health data.....	4
4.2	Processing health data for clients/occupiers.....	4
5	Data protection risk assessment	5
6	Recording and retaining data	6

1 Introduction

This document provides support to all RICS regulated firms in England on the data protection considerations they will need to apply when recording the health information needed to enable safe working in client properties, whether these are residential or commercial.

This document does not constitute legal advice and firms must consider whether they require advice from a legal or data protection professional.

RICS is grateful to the team at Knight Frank, and in particular to Emma Hall, Privacy Lead and Legal Counsel, for their help and contribution to this document.

2 Current government guidance

As of 26 May 2020, the UK government has issued various guidance on reopening the estate agency market in England.

The guidance on home moving, [Government advice on home moving during the coronavirus \(COVID-19\) outbreak](#) says that:

‘Agents should ask whether any party is showing symptoms or has been asked to self-isolate before going ahead with any viewing, or visits to offices.’

The guidance for [Working safely during coronavirus \(COVID-19\) in other people’s homes](#) requires a COVID-19 risk assessment. As part of ensuring that work involving visiting another person’s home can be done safely, the guidance states that:

- individuals who are advised to stay at home under existing government guidance do not physically come to work, including individuals who have symptoms of COVID-19 and those who live in a household with someone who has symptoms; and
- no work should be done in a household which is isolating because one or more members has COVID-19 symptoms or is shielding.

This guidance means that firms will need to ask their staff and occupiers of properties about whether they, or someone in their household, has COVID-19 symptoms or is shielding. This government guidance may change in future and firms should continue to check the up to date position. Firms in other parts of the UK should follow the government guidance in force at the time their property market is reopened.

3 Processing data about COVID-19 symptoms lawfully

In order to carry out a risk assessment immediately before sending a staff member to visit a property, the firm will need to collect information about the health of the staff member and any occupants of the property who will be present at the visit.

Health information is personal data under the *General Data Protection Regulation* (GDPR), and therefore firms need to comply with the GDPR and the *Data Protection Act 2018* (DPA 2018) when recording and using the information collected during the assessment. That means firms must meet one of the six available legal bases for processing personal data handling under the GDPR.

Personal data relating to health is more sensitive and classed as ‘special category data’ so it must be carefully protected. This means that firms must meet one additional ‘special category’ condition for processing health data.

Advice about the legal bases for processing data is available on the [Information Commissioner’s \(ICO\) website](#).

The ICO has also provided advice about the [legal basis for workplace testing and COVID-19 symptoms](#). Although the government guidance for estate agents does not require workplace testing, this document contains helpful advice on handling employee health data.

Firms can also seek further guidance from the ICO helpline (0303 123 1113).

4 Legal bases

4.1 Processing staff health data

Each firm should consider the most appropriate legal basis to use. The ICO has given advice that legitimate interests is likely to be appropriate for private firms processing personal data and the relevant additional special category condition will be the employment condition in Article 9 of the GDPR, along with Schedule 1 condition 1 of the DPA 2018.

Firms that wish to rely on legitimate interests should carry out a legitimate interests assessment before starting the processing. This is a light-touch risk assessment based on the specific context and circumstances. It will help firms ensure their processing is lawful. Recording the assessment will also help demonstrate compliance in line with the accountability obligations under the GDPR.

The ICO website provides [advice on how to do this](#) and a template firms can use.

4.2 Processing health data for clients/occupiers

The firm should consider which legal basis it considers is most appropriate. The ICO has provided advice that firms could use the legal basis of 'consent' to collect this information. The special category condition will be 'explicit consent'.

The firm will need to demonstrate that each adult client or occupier who will be present when the visit takes place has given explicit consent to the firm recording his or her health data. If any children will be present when the visit takes place a parent or guardian should give explicit consent on their behalf.

5 Data protection risk assessment

While the government guidance means that firms will need to ask their staff and occupiers of properties about whether they or someone in their household has COVID-19 symptoms or is shielding, it does not prescribe how this should be done. To help demonstrate compliance in line with the accountability obligations under the GDPR, firms should consider conducting a Data Protection Impact Assessment (DPIA) focussing on the new areas of risk, the mitigating actions that can be put in place to counter the risks, and a plan or confirmation that mitigation has been effective.

The ICO website provides [advice for how to do this](#) and a template firms can use.

The DPIA should be regularly reviewed and updated as new guidance, risks and benefits emerge.

6 Recording and retaining data

It is important to only collect and retain the minimum amount of information needed to fulfil a purpose.

Firms will need to retain clear records of the explicit consent given by clients or occupiers to the firm recording his or her health data. Ideally this should be provided in writing by email, but it could be given orally provided a clear statement about the collection and use of the information has been given by the firm and a clear statement of consent to the specific processing has been freely given by the client or occupier. Firms may wish to provide a script to those carrying out the risk assessment to provide assurance that each client has been given the same information.

When collecting the information, firms should tell clients or occupiers that completing the assessment is voluntary, but it may not be able to safely conduct the viewing without the information.

Firms should also keep records, in relation to both staff and clients, that confirmation of no symptoms was given. However because this is sensitive health data:

- access to this data should be restricted to those who have a need to know
- it should be kept securely and
- it should be destroyed as soon as it is no longer needed for contact tracing in the event of someone developing symptoms.

The firm should carefully consider whether any information about recorded symptoms needs to be kept, or whether visits can simply be rescheduled or refused where symptoms, isolation or shielding are reported.

Firms should retain a record that a clear risk assessment was carried out in order to comply with health and safety legislation but should seek to do this in a way that does not include identifiable personal data.

Transparency is very important. The firm should review its client and employee privacy notices to ensure they explain how and why health information is being collected, what decisions will be made with that information and how long it will be retained.

Firms may also want to add this to any information they provide to clients about the service they provide explaining that the firm will ask the client or occupier whether they have symptoms of COVID-19 for the safety of its staff.

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Americas

Latin America

ricsamericalatina@rics.org

North America

ricsamericas@rics.org

Asia Pacific

Australasia

australasia@rics.org

Greater China (Hong Kong)

ricshk@rics.org

Greater China (Shanghai)

ricschina@rics.org

Japan

ricsjapan@rics.org

South Asia

ricsindia@rics.org

Southeast Asia

sea@rics.org

EMEA

Africa

ricsafrica@rics.org

Europe

ricseurope@rics.org

Ireland

ricsireland@rics.org

Middle East

ricsmiddleeast@rics.org

United Kingdom RICS HQ

contactrics@rics.org



[rics.org](https://www.rics.org)