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**IN THE MATTER OF
THE LEGAL IMPLICATIONS OF THE USE OF THERMAL SCREENING IN THE
CONTEXT OF THE COVID-19 PANDEMIC**

OPINION

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A. Introduction

1. In response to the Covid-19 pandemic, many public spaces in the UK introduced thermal screening in the form of thermal imaging cameras or hand-held temperature assessment devices. The intention was simple: customers, visitors, passengers, employees and other entrants would be screened. If the device showed they had a raised skin temperature, they would be denied entry, or required to get a test prior to entry, to prevent the potential spread of Covid-19.
2. The initial introduction of thermal screening was in the context of an emerging global pandemic of a new illness. Companies were seeking to respond very quickly to the threat, in the absence of significant data about what measures would be effective or information about the potential adverse consequences of those measures.
3. With the removal of pandemic restrictions in the UK, many organisations have suspended thermal screening. However, a cursory glance online shows the technology is still being sold and the prospect of intermittent reintroduction of such screening, potentially at short notice again, remains live. Organisations now have the opportunity to pause and consider whether thermal screening is an appropriate and effective public health tool. In this context we have been instructed by Big Brother Watch (“BBW”), a UK civil liberties campaign group, to advise on the potential legal implications of thermal screening from a data protection, equality and human rights perspective.
4. There have been limited studies done on the efficacy of thermal screening and even less research on the impact of thermal screening on individuals. We have been asked to draft this Opinion in the form of a general consideration of the principles in play, rather than providing specific advice on concrete examples of thermal screening. This necessarily means that our advice is general in nature. Law is not applied in a vacuum: individual cases will require our general analysis below to be adjusted and considered individually. However, in order to illustrate potential areas of risk, we have used some examples. This Opinion does not therefore address the specific circumstances of any individual case and it should not be relied on for that purpose.

5. For the purposes of drafting this advice, we have been provided with specific material, which is set out in Appendix A. We recognise that this is only a limited snapshot of the relevant evidence which may be available. Our advice below is based on the evidence provided to us and therefore may be subject to revision should further relevant evidence be brought to our attention and/or in respect of any specific individual circumstances.

B. Executive summary

6. The documentation that we have been provided suggests that the scientific evidence to support the use of thermal screening to reduce the transmission of Covid-19 is very weak or inconclusive.
7. In that context, we consider that organisations who continue to use such screening face the risk of being in breach of the GDPR¹ and, if certain circumstances apply, the Equality Act 2010. Public authorities may also face some risk in relation to an interference with the right to a private life and the right to be protected from discrimination, enshrined within Articles 8 and 14 of the European Convention on Human Rights, although we consider this is less likely to arise in practice.
8. Organisations who choose to continue the use of such screening will greatly increase their legal risk in the absence of taking basic steps, which include:
 - a) considering, recording and keeping under review the evidence relied on in support of a decision to undertake thermal screening;
 - b) performing a data protection risk assessment;
 - c) ensuring the method by which they screen provides for a confidential way in which those being screened can disclose confidential health or other factors which may affect their temperature;
 - d) providing information to those being screened, preferably available in advance, in respect of the nature of screening and steps that can be taken if the screening gives them cause for concern.

¹United Kingdom General Data Protection Regulation.

9. Further suggestions to minimise the impact on individuals of screening and to seek to reduce legal risk are set out in the body of our advice below. Although taking these steps may help, we do not consider that they will extinguish legal risk unless they are taken together with identifying evidence which suggests that screening has objective value such as to outweigh the potential negative impact of screening.

C. Summary of evidence as to effectiveness of thermal screening

10. Based on the information provided to us, there appears to be a growing body of research and Government guidance which suggests that thermal screening is ineffective at reducing the spread of Covid-19. That body of research and guidance has increased since the outset of the pandemic and includes the following:-

- a) Public Health England published an Information Sheet, which states that using temperature to detect Covid-19 is ‘not very accurate’ and temperature checking might give people ‘false reassurance’.²
- b) On 1 June 2020, Healthcare Improvement Scotland Evidence produced a report that concluded the evidence on whether screening by thermal imaging systems is effective in controlling infectious disease transmissions was ‘weak or inconclusive at best’.³
- c) On 3 July 2020, the Medicines and Healthcare Products Regulatory Agency (‘MHPR’) put out a statement saying that there is ‘little scientific evidence to support temperature screening as a reliable method for detection of Covid-19 or other febrile illness, especially if used as the main method of testing’, that temperature screening systems measure skin temperature rather than core body temperature and that temperature can fluctuate amongst healthy individuals in any event.⁴ In the same statement the Minister for Health said that ‘it’s important businesses do not rely on temperature screening tools and other products which do not work’ and that the best way to minimise risk was to follow government guidelines.

²Information Sheet E: Temperature checks and thermal scanning’ Public Health England, undated.

³‘Should temperature screening by thermal imaging systems be part of the policy response to curb Covid-19 transmission?’ Healthcare Improvement Scotland, Evidence, 1 June 2020.

⁴<https://www.gov.uk/government/news/dont-rely-on-temperature-screening-products-for-detection-of-coronavirus-covid-19-says-mhra>

- d) In an article dated 3 August 2020, Margaret McCartney, GP, and Carl Henegan, Professor of Evidence-Based Medicine, reviewed the evidence in respect of the use of thermal screening and concluded:

‘All this adds up to an unreliable device, being used to measure an unreliable proxy, where there is no previous evidence to support its use. The current vogue for use of these machines lends more to marketing than medical evidence.

Infrared screening for temperature results in large numbers of false positives, either offering false reassurance or unnecessary alarm – and potential exclusion of the person from work or leisure activities. The nature of this testing risks public embarrassment and confidentiality when used in the mass setting. Temperature screening is not reliable and should therefore not be used.’⁵

- e) A trial was undertaken in the UK of thermal screening of bus drivers by the Transport Research Laboratory Limited on behalf of Transport for London.⁶ The report dated 4 September 2020 explains that the trial involved 55,962 temperature tests using hand-held devices or remote sensing. 68 individuals ‘failed’ the test (ie., had a temperature of 37.8C or above). They were allowed to sit down for five minutes and of those 68, 6 failed the test a second time. These individuals were told to self-isolate and undertake a swab test. None of those individuals tested positive following a swab test. The average time lost due to self-isolating and awaiting a swab test result was 2.8 days.

- f) On 24 September 2020 the European Centre for Disease Prevention and Control (‘ECDC’) published ‘Guidelines for the implementation of non-pharmaceutical interventions against COVID-19’. In respect of temperature scanning on entry at national borders, it stated:

‘Entry screening of passengers with temperature scanners is not effective in delaying or mitigating local transmission. This is mainly due to the inability to detect cases during the incubation period, prior to onset of virus shedding and the high proportion of cases who do not develop fever or any symptoms [142,232]. Internal modelling

⁵<https://www.cebm.net/2020/08/screening-for-covid-19-with-infrared-thermometers-more-marketing-than-medical-evidence/>

⁶‘Covid-19 Response: London Bus Garage Temperature Testing Trial’, TRL Limited, 4 September 2020.

work at ECDC supports these findings. Studies at points of entry have shown that mass screening programmes using non-contact devices (such as infrared thermal scanners) have not been effective in identifying infectious persons and limiting spread of disease, as detection rates have been consistently low. A recent modelling study in pre-print for the UK estimates that temperature screening alone is only 0.78% effective in detecting cases (CI: 0.19-1.64) [234]. Furthermore, thermal screening is costly and resource intensive [234-236].⁷

- g) A review of evidence in *Medical Virology* published on 7 November 2020 aimed to ‘review the evidence on non-contact thermal screening as a method to identify cases and limit the spread of Covid-19’.⁸ The review considered evidence from studies of screening at points of entry (such as airports etc.) as a method to identify respiratory viruses in a pandemic setting. Some of these were studies undertaken in the context of previous respiratory pandemics, so may not be directly comparable to the Covid-19 pandemic. However, all the studies concluded that the use of thermal screening in conjunction with self-reported symptoms or travel and contact history were ineffective as a means to identify infected cases and limit the spread of pandemic respiratory viruses. The authors also note that whilst infrared thermometers have their advantages, other factors can impact on surface body temperature. For example, circulatory problems may lower surface temperature in an individual who has a fever leading to a false sense of security if they ‘pass’ thermal screening. Conversely, stimulants like caffeine can increase body temperature generating unnecessary further testing. An example was given of a study of thermal screening in the SARS pandemic where 442,973 passengers were screened on arrival in Singapore, of whom 136 were referred to SARS-CoV testing, none of whom were then diagnosed as having SARS-CoV. Further, the authors highlighted that as asymptomatic and pre-symptomatic transmission is a feature of Covid-19, thermal screening will not pick up such cases.

⁷<https://www.ecdc.europa.eu/sites/default/files/documents/covid-19-guidelines-non-pharmaceutical-interventions-september-2020.pdf> P20.

⁸<https://onlinelibrary.wiley.com/doi/full/10.1002/rmv.2192>

D. Data Protection

11. The GDPR requires that in respect of the processing of certain data, organisations have a lawful basis for processing that data and otherwise comply with the principles of the GDPR.⁹ In the following section, we consider:
- a) whether the GDPR is likely to apply to thermal screening;
 - b) the potential lawful bases for processing of data as part of thermal screening;
 - c) in particular, whether thermal screening is ‘necessary’ for reasons of substantial public interest in the area of public health or to protect the health and safety of employees; and
 - d) the approach taken by some European regulatory authorities in respect of thermal screening.
12. This advice focusses on the legal basis for processing temperature data. However, organisations processing such data have other obligations under the GDPR and other steps that may need to be taken are set out in Appendix B.

Does thermal screening amount to the processing of personal data to which the GDPR applies?

13. The GDPR applies to the automated or structured processing of personal data (any information relating to an identified or identifiable person).
14. It seems uncontroversial that a person’s temperature is information relating to them. Typically, thermal screening devices do not store information about a person’s identity, with their temperature. However, very often the person to whom the temperature relates will be identifiable via other means – for example, the person operating a temperature gun will know that the temperature flashing up on their screen relates to the person whose forehead they just directed the device towards. Accordingly, in our opinion an individual’s

⁹See <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/> for a full list of the principles.

temperature reading will normally constitute their ‘personal data’ within the meaning of Article 4(1) GDPR.

15. Even if an individual’s temperature is not retained or stored, the mere collecting of that personal data is likely to fall within the definition of ‘processing’ under Article 4(2) GDPR, which makes specific reference to the ‘collection’ of personal data being an example of processing.
16. Further, in most cases the processing is automated because it will involve an infrared scanner or similar device detecting skin temperature and converting that into a number or image which purports to show whether temperature is ‘normal’ or above ‘normal’.
17. If the temperature is stored alongside any other material which could be used to identify the person whose temperature it is, such as CCTV recordings or login time stamps, the storage of that data is likely also to amount to a form of processing.
18. If temperature is taken manually (e.g. by using a manual thermometer) and the readings are not stored in any form of filing system, this is unlikely to be caught by the provisions of the GDPR, unless, potentially, if undertaken by a public authority. However, very few organisations will be operating such a system because of the proximity and time required for temperature to be taken in this way.
19. Accordingly, we are of the view that automated thermal screening undertaken by most organisations is likely to fall within the scope of the GDPR.
20. Further, because temperature is data concerning health it amounts to ‘special category’ data and is subject to the additional controls set out in Article (9) GDPR.
21. In an advice note dated 4 September 2020 in respect of temperature testing in airports¹⁰, the ICO considered that the use of thermal cameras at airports *would* amount to processing personal data and fall within the scope of the GDPR. Further, in public guidance for organisations in respect of Coronavirus, that was available on its website as of December 2021, the ICO stated that:

¹⁰ICO advice on temperature testing in airports’ 4 September 2020.

“Taking a temperature using a digital thermometer involves the processing of personal data, even if you don’t record any information. Whether you make a record or not, you should be careful how you handle this data. Under data protection law you must treat it as ‘special category data’, as someone could infer information about an individual’s health and could then make a decision about an individual. Therefore this technique requires a clear justification, and you should consider it as potentially intrusive.”¹¹

What are the lawful bases on which organisations are likely to seek to rely for the purposes of thermal screening?

22. There are several principles which apply to the processing of special category personal data under the GDPR. First, there must be a lawful basis under Articles 6 and 9 for the processing of such data.

Consent

23. One such basis is that the data subject (i.e. the person being screened) has given explicit consent to the processing of their data.

24. However, to be a valid basis for processing, consent must be freely given and in determining if it is so given, ‘utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract’ (Article 7(4) GDPR). Accordingly, where consent to the processing of data that is not necessary for the provision of a service is required before a service will be provided, that consent is unlikely to be a valid basis for processing.

25. For example, consent to thermal screening is not *necessary* for someone to eat at a restaurant (i.e., pay for and be served food). So, if a restaurant requires a customer to undergo thermal screening before they will serve them, the provision of the service is conditional on consent to the processing of data not necessary for performance of that contract.

¹¹ <http://web.archive.org/web/20211229024608/https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/coronavirus-recovery-data-protection-advice-for-organisations/testing/>

Therefore, it is unlikely to be considered a ‘freely given’ consent which will form a legal basis for processing the temperature data.

26. Alternatively, if there is an imbalance of power between the organisation and the person they are screening, it is unlikely that any consent given to processing will be valid (see Recital 43 GDPR). For example, an employer who requires employees to undergo thermal screening to attend work or while at work will not be able to rely on consent as a lawful basis for processing.
27. As set out below, numerous European data protection authorities have expressed the view that consent is unlikely to be a lawful basis for undertaking thermal screening if it is mandatory or done by someone in a position of power.
28. If the consent is genuinely freely given, then that may be a lawful basis for processing the data of those who consent. For example, if people entering a shop are fully informed about the nature of the screening being undertaken and invited to give explicit consent to thermal screening, but can still enter if they do not consent to the screening. However, such an approach somewhat undermines the point of the exercise: those who are feeling unwell may simply decline screening.

Employment obligations and public health

29. Employers may seek to rely on the exception which permits processing of special category data if it is necessary to carry out their obligations in the field of employment (Art 9(2(b)). In particular, employers may rely on the exception for the purposes of protecting the health and safety of other employees.
30. The most likely basis for processing on which other organisations would seek to rely, is processing ‘necessary for reasons of substantial public interest in the area of public health’ (Article 9(2)(i)).
31. Recital 54 GDPR gives guidance on what is meant by ‘public health’ and says it should be interpreted as including:

‘all elements related to health, namely health status, including morbidity and disability, the determinants having an effect on that health status, health care needs, resources allocated to health care, the provision of, and universal access to, health care as well as health care expenditure and financing, and the causes of mortality.’

32. It seems to us self-evident that prevention of the spread of Covid-19 would be a reason of substantial public interest in the area of public health.

33. In order to rely on this basis, the processing must be both:

a) necessary (Article (9)(2)(i), and,

b) carried out by or under the responsibility of a health professional, or by another person who in the circumstances owes a duty of confidentiality under an enactment or rule of law (Schedule 1(3) Data Protection Act 2018 (‘DPA 2018’)).

34. In respect of employers relying on the conservation of health and safety of other employees as the basis of processing:

a) the processing must be necessary for the purposes of performing an obligation imposed by law in connection with employment (Article (9)(2)(b) / Schedule 1(1)(a) DPA 2018), and,

b) the employer must have an appropriate policy document in place (Schedule 1(1)(b) DPA 2018).

Is thermal screening ‘necessary’ for reasons of substantial public interest in the area of public health or to protect the health and safety of employees?

35. ‘Necessary’ does not mean absolutely essential, but it must be more than just useful or standard practice and must objectively be a targeted and proportionate way to achieve the purpose.¹²

¹²<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/#when>

36. For organisations grappling with the lawfulness of processing temperature data, the critical question will be whether such processing is proportionate. There may be legitimate arguments as to the value of even very low efficacy in detecting cases where that may assist in reducing transmission (such as the 0.78% figure cited in the ECDC Guidelines referenced above at paragraph 10(f) above). However, the apparent lack of any strong objective evidence to support the necessity or indeed efficacy of thermal screening, as set out above, should trigger particular scrutiny by organisations who choose to deploy it as a public health or health and safety measure.
37. In the ICO opinion referred to at paragraph 21 above, the ICO noted that in responding to the Covid-19 pandemic controllers will ‘not always have firm evidence of the effectiveness of new initiatives’ and in a pandemic ‘particularly, where there is a low impact on privacy, limited benefits or even potential benefits may be sufficient to justify the processing of data’. Further, that the ICO would be looking for a ‘rational approach to controller’s assessment of the available evidence and advice in making the decision whether temperature checking is necessary and proportionate’ and that presenting ‘evidence on the benefits and potential benefits of temperature checking will help demonstrate this’.
38. This guidance is now two years old and thermal screening is arguably no longer a ‘new’ initiative. We consider it likely that the ICO and the courts *would* now expect a controller to provide some evidence of the effectiveness of such screening (as opposed to just potential benefit).
39. Another relevant question as to the ‘necessity’ test is how far the definition of ‘public interest in the area of public health’ may be stretched. In the ICO opinion, the ICO considered that the broad meaning of ‘public interest in the area of public health’ when considered in light of Recital 54 GDPR, meant that it would ‘include the impact of an economic shock in a pandemic on short and long term health’:

‘the “determinants having an effect on health status”, particularly in the context of a pandemic, include purposes which are wider than simply stopping the spread of the virus, and could also include, for example, purposes for public reassurance and economic recovery. This takes into account the greater the social impact and economic shock caused

by the pandemic, the greater the impact on public health.¹³

40. This suggests to us that that as of September 2020, the ICO envisaged that airports, at least in part, might be using or considering using thermal screening as a way to increase confidence of passengers and therefore assist with the economic recovery by boosting air travel. Whether the same would be the case today, as the panic and fear associated with the Covid-19 pandemic has subsided, is less certain.
41. For our part, we are sceptical that the courts would stretch the interpretation of ‘public interest in the area of public health’ to include economic recovery or general provision of reassurance. Recital 51 identifies that special category data merits ‘specific protection as the context of their processing could create significant risks to fundamental rights and freedoms’ and that derogations from the ‘general prohibition for processing such special categories of personal data should be explicitly provided’. Recital 53 indicates that the exceptions to the general rule against processing special category data which relate to health are in particular concerned with the context of ‘management of health or social care services and systems’. Article 9 explicitly provides for particular lawful bases of processing ‘in the public interest’: namely, in the area of public health, archiving purposes in the public interest, or where necessary for reasons of ‘substantial public interest’ on the basis of domestic law. Schedule 1, Part 2 DPA 2018 provides specific ‘substantial public interest’ circumstances such as ‘preventing fraud’ or ‘the administration of justice’. Read in that context, interpreting the ‘determinants having an effect of health status’ so widely as to include the economic conditions in general would go against the grain of the legislation. If processing that was in the public interest in the area of economic strength was to be exempted from the prohibition against processing of special category data, Recital 51 suggests that should have been explicitly provided.
42. One aspect of the proportionality assessment may relate to the context of how, where and why the screening is performed. For some individuals, thermal scanning may be likely to engender particular concern, particularly where it risks causing significant stress, embarrassment or hardship. Collection of temperature data may lead to individuals having to disclose sensitive information to explain atypical readings or being denied entry to somewhere or subjected to unnecessary further testing in circumstances of negligible

¹³ICO advice at page 3.

proven benefit to public health. Stress or embarrassment is particularly likely to be caused if screening takes place in a public place, such as outside a shop or restaurant, or within a school or workplace, with no provision for a confidential discussion of a heightened skin temperature.

43. Various non-Covid-19 related circumstances such as ovulation, some contraceptive pills and pregnancy have been associated with a higher body temperature at times.¹⁴ Whilst we have been provided with some anecdotal evidence that suggests distress may be caused by thermal screening (including to those experiencing hot flushes or temperature fluctuations due to the menopause), the available evidence is extremely limited. However, the distress caused by thermal screening in such cases would need to be weighed against the benefits of such screening in considering whether it was necessary. As we identify below, it may also become particularly relevant in the context of whether thermal screening is lawful pursuant to the Equality Act 2010.

Is thermal screening undertaken in circumstances where the controller owes a duty of confidence to the data subject in respect of the data collected?

44. Even where processing is necessary for a public interest related to public health, it must be carried out by or under the responsibility of a health professional, or by another person who in the circumstances owes a duty of confidentiality under an enactment or rule of law in order to be lawful (Schedule 1(3) DPA 2018).
45. Very few organisations undertaking thermal screening will be using a health professional to collect the temperature data. Therefore, we have focussed on whether organisations are likely to be successful in arguing that the data is being processed by another person who, in the circumstances, owes a duty of confidentiality under an enactment or rule of law.
46. Whether this criterion will be fulfilled will be fact specific. It does not seem to be commonplace for organisations to give an explicit undertaking to keep temperature data confidential. In the absence of such an undertaking, our view is that such a duty is unlikely

¹⁴We have been referred to the following: <https://www.ncbi.nlm.nih.gov/books/NBK546686/>, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8353691/>, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6910775/>.

to be implied, particularly if the screening takes place in public or in front of others, as is often the case, or if the results may be visible to more than just the operator of the thermal screening device (eg, in a queue to enter a workplace).

European data protection authorities' approach

47. Various data protection authorities ('DPA's) in Europe have issued guidance in respect of the use of thermal screening. We note, however, that we have not been instructed to undertake a detailed consideration of approaches taken within the EU and that this overview is necessarily limited. Nevertheless, such guidance may be a useful illustration and indication of the approach which may be followed by domestic courts and the ICO in the UK. Those to which we have been referred appear to agree that non-manual thermal screening amounts to the processing of personal data and accordingly suggest caution in respect of its use and measures that should be taken if thermal screening is being considered. Some DPAs go further than this and suggest there is unlikely to be a lawful basis for thermal screening in some settings.
48. The following non-exhaustive examples are not intended to be a definitive overview, but provide illustration of the way in which thermal scanning is being or has been considered by different EU countries pursuant to the GDPR over the course of the pandemic:
- a) Belgian DPA: In guidance, updated on 4 February 2021, a distinction is drawn between manual temperature checking and any form of automated checks, including thermal scanning. It indicates that an obligation to ensure health and safety at the workplace is not specific enough to legitimise the processing of health data for Covid-19 monitoring purposes and that temperature checks by automated means would not be allowed;¹⁵
 - b) On 4 April 2022 the Litigation Chamber of the Belgian Data Protection Authority ('SA') issued substantial fines to Brussels Zaventem Airport and Brussels South Charleroi Airport.¹⁶ The BDPA concluded that there was no valid legal basis for

¹⁵autoriteprotectiondonnees.be/prise-de-temperature-dans-le-cadre-de-la-lutte-contre-le-covid-19

¹⁶Decisions 47/2022 and 48/2022; and <https://www.autoriteprotectiondonnees.be/publications/decision-quant-au-fond-n-47-2022.pdf> and <https://www.autoriteprotectiondonnees.be/publications/decision-quant-au-fond-n-48-2022.pdf>.

processing the thermal screening data. It held that the thermal imaging constituted automated processing of personal data and engaged the GDPR. The airports had based their processing on a Protocol which was non-binding under national law. The SA found that the necessity for processing the data in compliance with a legal obligation or task carried out in the public interest had not been demonstrated. Further, there had been a lack of transparency and a failure to undertake a Data Protection Impact Assessment.

- c) On 26 June 2020, the Urgent Applications Judge of the French Conseil d'Etat ordered¹⁷ the suspension of mobile thermal cameras at the entrance to school buildings within the city of Lisses, in response to various applications relating to thermal scanning by La Ligue des droits de l'Homme. The mobile cameras had been operated during school time in order to scan raised body temperatures of pupils, staff and other personnel. The Judge found that this constituted the automated collection of sensitive personal data within the meaning of Article 2 GDPR and that in the absence of a law justifying the use of thermal cameras and without either the consent of students or employees, the continued use of the thermal screening could not be justified or permitted. However, in respect of the use of fixed thermal cameras within municipal buildings, no violation was found on the basis that access to the premises was not conditional on submitting to a temperature check, and that, in any event, no data was in fact collected by the system which had no memory capacity. Accordingly, the use of such screening was permitted in such circumstances.
- d) French DPA (CNIL): We have found recent guidance (April 2022) in which the CNIL distinguishes between manual thermometer checks (where no trace is recorded), which it says does not fall under data protection law, and thermal scanning through cameras, which is expressed to be prohibited by Article 9 GDPR, in the absence of any law which expressly provides for the possibility.¹⁸
- e) Spanish DPA (AEPD): On 30 April 2020, the Spanish DPA issued detailed guidance on its concern about temperature screening by businesses, work and other

¹⁷ <https://www.conseil-etat.fr/decisions-de-justice/dernieres-decisions/conseil-d-etat-26-juin-2020-cameras-thermiques-a-lisses>

¹⁸<https://www.cnil.fr/fr/covid-19-questions-reponses-sur-la-collecte-de-donnees-personnelles-sur-le-lieu-de-travail#donn%C3%A9es-sant%C3%A9>

establishments. It recognised that consent is unlikely to be a valid basis for processing and suggested that a legal obligation or public interest will be the only valid bases and require compliance with the relevant criteria associated with those bases.¹⁹

- f) However, in a decision of 25 May 2021²⁰, the AEPD investigated El Corte Inglés, a large Spanish department store, in respect of its thermal cameras which were deployed to verify whether employees, customers or visitors had a high body temperature as part of its Covid-19 screening. It found that although temperature checks did constitute personal data, the GDPR was not applicable essentially because there were no circumstances in which the temperature check verified the identity of the individual. The system used showed the temperature map to private security guards but did not show recognisable details to identify visitors and nor was it combined with video surveillance cameras. The body temperature data was displayed in real time and only to a member of the private security department located in the control centre. A similar decision was taken on 25 May 2021 by the AEPD in respect of thermal screening undertaken by the company that managed the underground service of Bilbao.²¹ There it was found that the random screening of passengers by way of thermal imaging cameras did not fall within the scope of the GDPR because the individual's data was not stored or recorded and their name was not taken. The AEPD found that the individual's anonymity was maintained as they did not have to identify themselves and their image was not stored, they simply had to do a second test if their skin temperature was high. These decisions are hard to reconcile with the AEPD detailed guidance referred to above and seem to potentially conflate the question of whether information relates to an 'identifiable natural person' so as to amount personal data, with whether it relates to a *named* individual, which is not necessary for it to amount to personal data.
- g) European Data Protection Supervisor: In September 2020, the EDPS advised that necessity and proportionality of temperature checks of staff and other visitors to European institutions should be reviewed regularly in light of the evolution of the pandemic and its scientific understanding, and that mandatory screening should not

¹⁹<https://www.aepd.es/es/prensa-y-comunicacion/notas-de-prensa/comunicado-aepd-temperatura-establecimientos>

²⁰E/03882/2020: <https://www.lenguajejuridico.com/documentos/resoluciones-administrativas/e-03882-2020.pdf>

²¹ [https://gdprhub.eu/index.php?title=AEPD_\(Spain\)_-_E/03884/2020](https://gdprhub.eu/index.php?title=AEPD_(Spain)_-_E/03884/2020)

be done on a solely automated basis and should include some meaningful human involvement at relevant stages of the screening process for example, by someone competent (such as a doctor or nurse) to assess the specific situation of the data subject.²²

Conclusion

49. We consider that the GDPR is likely to apply to automated thermal screening used for the purposes of identifying whether an individual might have Covid-19. Further, in the absence of an organisation or employer having identified some evidence (whether expert, statistical or from internal data) to support that mandatory thermal screening is likely to assist public health or protect the health and safety of employees and having complied with the other requirements related to those bases, they are likely to be at real risk of having no lawful basis for processing such data. Further, even if they do identify a lawful basis, ongoing screening would need to be kept under review and the other steps set out at Appendix A complied with to ensure the processing was done lawfully.

E. Equality Act 2010

50. Organisations using thermal screening in the context of providing goods and services, employment or education are also likely to be subject to obligations under the Equality Act 2010 ('EqA 2010').²³

51. The application of the EqA 2010 will turn on the specific facts of any individual case. However, it is possible that a further area of legal risk would arise if thermal screening has a disparate impact on certain groups or someone is either excluded from a space or subjected to further screening because of a high temperature that arises in consequence of a disability.

52. In order to illustrate potential areas of risk, we have considered two fictitious scenarios.

²²https://edps.europa.eu/sites/edp/files/publication/01-09-20_edps_orientations_on_body_temperature_checks_in_the_context_of_euis_en.pdf

²³Parts 3, 5 and 6 Equality Act 2010.

Indirect discrimination

53. Scenario: A woman ('W') is denied entry to a restaurant as a result of having a skin temperature of 37.8C detected via thermal screening at the entrance. She then brings a claim that she has been subjected to indirect sex discrimination under s.19 EqA 2010.
54. Legal framework: To succeed in such a claim she would have to show:
- a) the restaurant has a provision criterion or practice ('PCP') that it applies or would apply to men and women;
 - b) the PCP puts or would put women to a particular disadvantage when compared with men;
 - c) the PCP put W at that disadvantage.
55. If W establishes the above, the restaurant could nonetheless successfully resist the claim if it can show the PCP is a proportionate means of achieving a legitimate aim.
56. Analysis: Refusing entry to someone with a skin temperature of 37.8C or above is a PCP that the restaurant is applying to both men and women.
57. It appears that there is some evidence to support the suggestion that women may be more likely than men to have a temperature above the 'normal' range for various reasons, as set out above in paragraph 43. If W can establish by reference to expert evidence, statistics or otherwise, that women are more likely than men to have a skin temperature of 37.8C or above in the absence of Covid-19, then she would be able to establish that the restaurant's policy put or would put women at a particular disadvantage of being more frequently denied entry when compared with men and that she had been put at that disadvantage.
58. It would then fall to the restaurant to show that the policy is a proportionate means of achieving a legitimate aim. The reduction of the transmission of Covid-19 is clearly a legitimate aim. In this context a PCP is a 'proportionate' means of achieving an aim if it is an appropriate and reasonably necessary means of responding to a real need and this

involves weighing up the justification against the discriminatory effect of the PCP.²⁴ However, in respect of proportionality, the restaurant would face similar issues as discussed above in the data protection context in light of the evidence that suggests the efficacy of thermal screening is weak.

Discrimination arising from disability

59. Scenario: A shop refuses entry to a man (P) suffering from Chronic Lymphocytic Leukaemia, a form of blood cancer, despite him telling them that he has cancer. P brings a claim for discrimination arising from disability contrary to s.15 EqA 2010.

60. Legal framework: To succeed in the claim, P would have to show that:

- a) he had a disability;
- b) the shop treated him unfavourably because he had a high temperature;
- c) his high temperature arose in consequence of his disability;
- d) the shop knew or could reasonably have known about the disability.

61. If P establishes the above, the shop could nonetheless successfully resist the claim if it can show the treatment was a proportionate means of achieving a legitimate aim.

62. Analysis: In accordance with Para 6(1) Schedule 1 EqA 2010, cancer is a disability. Further, it seems unlikely P would have any trouble showing that refusing him entry to a shop was unfavourable treatment because he had a high temperature.

63. The NHS website indicates that one of the symptoms of Chronic Lymphocytic Leukaemia is a high temperature, which is evidence that P could successfully rely on to show that his high skin temperature arose in consequence of his disability, depending on the circumstances.²⁵

²⁴*R(Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293; *R(E) v Governing Body of JFS and anor* [2010] 2 AC 728/

²⁵<https://www.nhs.uk/conditions/chronic-lymphocytic-leukaemia/>

64. In the scenario, P told the shop about his cancer and so the shop would not have a 'knowledge defence'. Even if P had not volunteered the information, he might have an argument that the shop could have reasonably been expected to know he had the disability if the shop failed to make any provision for disabilities to be discreetly disclosed prior to or during screening.
65. Again, the shop would be faced with justifying the treatment and are likely to face the same sort of issues as set out above in paragraph 58 in the context of indirect discrimination.

Summary

66. It is difficult to advise on discrimination claims in the abstract. Nevertheless, the examples above illustrate that organisations operating thermal screening at least face potential legal risk under the EqA 2010.
67. If organisations do decide to use thermal screening in any event, they may wish to consider:
- a) keeping their own (anonymised) records to see if there appears to be a disparate impact on certain groups and keeping those records under review;
 - b) keeping a record of any evidence relied on which indicates that thermal imaging *does* reduce transmission of Covid-19 to show that the scanning is a necessary and appropriate means of achieving that aim and keeping that evidence under review;
 - c) providing a confidential mechanism for individuals to declare disabilities that might impact on their thermal screening results.

F. Human Rights Act 1998

68. Thermal screening has not formed part of Government guidance, and bodies such as Public Health England, Healthcare Improvement Scotland and the MHPRA have adopted the cautious approach set out in paragraph 10 above. Accordingly, and at this stage, it is not proportionate for us to embark on any detailed consideration of any potential legal risks of such screening under the Human Rights Act 1998.

69. In brief, however, we consider that it is possible in certain circumstances that thermal screening *may* amount to interference with an individual's right to respect for private life, protected under Article 8 of the European Convention on Human Rights. 'Private life' is a broad term and can include activities taking place in a public context.²⁶ For example, where an individual has a sensitive medical condition and, as a result of the way in which thermal screening is enforced, is required to disclose that condition in a public space. However, we do not consider that thermal screening will always amount to a relevant interference.
70. If there is an interference with Article 8 by a public authority or private body carrying out public functions, then this will only be lawful if it is in accordance with the law and as necessary in a democratic society in the interests of *inter alia* public safety or the protection of health. In considering whether such an exception applies the courts would again have to consider whether the interference met a 'pressing social need' and is proportionate to the aims pursued, including a weighing of the competing interests involved.
71. If the use of the temperature data was not in compliance with the GPDR then this is likely to mean that there was a breach of Article 8 (if engaged) as it would not be in accordance with law. Further, the courts would be concerned with a similar weighing exercise as set out above as to any evidence of benefit from thermal scanning, against the interference in question.
72. If an interference with Article 8 arises in circumstances of potential disparate impact as outlined above, this also may engage Article 14: the right to be protected from discrimination in respect of the enjoyment of fundamental rights and freedoms.

G. Conclusion

73. This advice is a general exploration of applicable legal obligations based on the evidence provided rather than advice in respect of a specific case or based on a wide review of all possible relevant evidence.

²⁶See the decision of the Grand Chamber in *Barbulescu v Romania* [2017] IRLR 1032 at paras 70-71.

74. However, the analysis above, combined with similar analysis by the European DPAs, suggests that organisations should be wary of the legal implications of thermal screening, particularly in the data protection context. Real caution is required before proceeding with automated processing of special categories of personal data, even in the context of an urgent healthcare crisis such as the Covid-19 pandemic.
75. Organisations who nonetheless seek to pursue such screening are referred to Appendix B in respect of steps they should consider taking under the GDPR.

SCHONA JOLLY QC
JENNIFER DANVERS

Cloisters

6 October 2022

APPENDIX A: Documents accompanying instructions

For the purposes of preparing our advice, BBW has provided us with the following material:

- a) results of a survey of 236 people by Caroline Criado Perez;
- b) 'Information Sheet E: Temperature checks and thermal scanning' Public Health England, undated;
- c) 'Covid-19 Response: London Bus Garage Temperature Testing Trial', TRL Limited, 4 September 2020;
- d) The European Centre for Disease Prevention and Control ('ECDC') 'Guidelines for the implementation of non-pharmaceutical interventions against COVID-19', 24 September 2020;
- e) The Medicines and Healthcare products Regulatory Agency's statements dated 3 July 2020 and 27 July 2021;
- f) 'More Marketing than medical evidence: infrared thermometers to screen for Covid-19', McCartney and Henegan, The Centre for Evidence-Based Medicine, 3 August 2020;
- g) 'Should temperature screening by thermal imaging systems be part of the policy response to curb Covid-19 transmission?' Healthcare Improvement Scotland, Evidence, 1 June 2020;
- h) a document compiled by BBW setting out various medical conditions which may lead to high temperature with links to relevant medical information;
- i) a document compiled by BBW excerpting guidance from different countries on the data protection implications of thermal screening;
- j) 'ICO advice on temperature testing in airports', Information Commissioner's Office, 4 September 2020;

- k) a link to a report of a French case concerning thermal imaging in schools;
- l) ‘Why Temperature Screening for Coronavirus Disease 2019 With Noncontact Infrared Thermometers Does Not Work’, Wright and Mackowiak, Open Forum Infectious Diseases, 14 December 2020;
- m) ‘The effectiveness of non-contact thermal screening as a means of identifying cases of Covid-19: a rapid review of the evidence’, Cardwell and O’Neill and others, Medical Virology, 7 November 2020;
- n) ‘Fact: Thermal scanners cannot detect Covid-19’, screenshot from World Health Organisation website on 2 January 2022.

APPENDIX B: What steps should organisations who are using thermal screening take in relation to their GDPR obligations?

The ICO has provided the following helpful checklist in respect of processing special category data:

- ‘We have checked the processing of the special category data is necessary for the purpose we have identified and are satisfied there is no other reasonable and less intrusive way to achieve that purpose.
- We have identified an Article 6 lawful basis for processing the special category data.
- We have identified an appropriate Article 9 condition for processing the special category data.
- Where required, we have also identified an appropriate DPA 2018 Schedule 1 condition.
- We have documented which special categories of data we are processing.
- Where required, we have an appropriate policy document in place.
- We have considered whether we need to do a DPIA.
- We include specific information about our processing of special category data in our privacy information for individuals.
- If we use special category data for automated decision making (including profiling), we have checked we comply with Article 22.
- We have considered whether the risks associated with our use of special category data affect our other obligations around data minimisation, security, and appointing Data Protection Officers (DPOs) and representatives.²⁷

²⁷<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/special-category-data/#:~:text=Special%20category%20data%20is%20personal,not%20have%20to%20be%20linked>

We further recommend that in respect of identifying an Article 6 and 9 basis for processing the data, organisations keep a record of any evidence relied on to support that the processing is necessary, if applicable. Further, that steps are taken which may assist in establishing that the processing is proportionate, for example by providing a mechanism for individuals to be able to have their data collected and to discuss any 'abnormal' readings privately.

Or, if consent is relied on, that organisations are sure to make it clear that screening is optional and to have a mechanism to demonstrate that explicit consent was given following a clear explanation of how the data will be collected and used.