To: Emcor Rail Limited

of: 1 Thameside Centre
    Kew Bridge Road
    Kew Bridge
    Middlesex
    TW8 0HF

1. Emcor Rail Limited is a “data controller” as defined in section 1(1) of the Data Protection Act 1998 (the “Act”).

2. The Commissioner was informed that certain companies in the construction industry were requesting Mr Ian Kerr (trading as The Consulting Association) to check the names of potential staff against a list held by Mr Kerr who would then indicate to the relevant construction company if he held any intelligence information in relation to those named on his list that he considered might be relevant to the decision making process of the construction company. Occasionally, Mr Kerr would provide limited further information from his list on the candidate.

3. During the execution of a search warrant on Mr Kerr by the Commissioner’s office, the Commissioner obtained evidence that such a system was indeed operating within the construction industry. Certain information was seized, such as a ring binder containing 3,213 entries in relation to individuals which had been processed on electronic media, and a comprehensive card index system constituting an intelligence database.

4. The database held by Mr Kerr contained, amongst other things, sensitive personal data relating to the trade union activity of an individual, his employment conduct together with any information that the individual may pose a threat to industrial relations between an employer and its employees. It was clear that the database was maintained by Mr Kerr in a covert manner.

5. The Commissioner’s office also seized the identity of companies within the construction industry who may have obtained the information held in the database following contact with Mr Kerr. In addition, the Commissioner’s
office seized copies of invoices from Mr Kerr to construction companies for services provided, for example, employment checks on individuals.

6. On 11 March 2009 the Commissioner’s office sent a letter to the data controller who, on the available evidence, appeared to have subscribed to the service provided by Mr Kerr. The letter asked for certain information on a voluntary basis within 28 days to enable the Commissioner to determine whether the data controller has contravened any of the data protection principles.

7. The Commissioner has considered the data controller’s compliance with the provisions of the Act in light of the above, in addition to the data controller’s response to the Commissioner’s letter dated 11 March 2009. The Commissioner has also considered the data controller’s representations in response to the Preliminary Enforcement Notice dated 18 June 2009.

8. Section 4(4) of the Act provides that, subject to section 27(1), it is the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller. The relevant provision of the Act is the First Data Protection Principle.

9. The First Data Protection Principle provides, at Part I of Schedule 1 to the Act, that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions is Schedule 3 is also met.”

Paragraph 2 of Part II of Schedule 1 to the Act further provides that:

Sub-section 1

“Subject to paragraph 3, for the purposes of the first principle personal data are not to be treated as processed fairly unless-

(a) in the case of data obtained from the data subject, the data controller ensures so far as practicable that the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3), and

(b) in any other case, the data controller ensures so far as practicable that, before the relevant time or as soon as practicable after that time, the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3).
Sub-section 2

In sub-paragraph (1)(b) “the relevant time” means-

(a) The time when the data controller first processes the data, or

(b) In a case where at that time disclosure to a third party within a reasonable period is envisaged-

(i) If the data are in fact disclosed to such a person within that period, the time when the data are first disclosed,

(ii) if within that period the data controller becomes, or ought to become, aware that the data are unlikely to be disclosed to such a person within that period, the time when the data controller does become, or ought to become, so aware, or

(iii) In any other case, the end of that period.

Sub-section 3

The information referred to in sub-paragraph (1) is as follows, namely-

(a) the identity of the data controller,

(b) if he has nominated a representative for the purposes of this Act, the identity of that representative,

(c) the purpose or purposes for which the data are intended to be processed, and

(d) any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair.”

10. The Commissioner is of the view that the data controller has contravened the First Data Protection Principle in that, amongst other things, it has processed personal data unfairly by obtaining personal data from Mr Kerr and failing to provide such individuals with the information referred to in sub-section 3 referred to above at the relevant time or at all. Information as to whether an individual is a member of a trade union is “sensitive personal data” under section 2(d) of the Act. In addition, the Commissioner considers that none of the conditions for processing in Schedules 2 and 3 to the Act have been met as required by the First Data Protection Principle.

11. The Commissioner has considered, as he is required to do under section 40(2) of the Act when deciding whether to serve an Enforcement Notice, whether any contravention has caused or is likely to cause any person damage or distress. The Commissioner takes the view that damage or
distress to individuals is likely as a result of them being denied the opportunity of explaining or correcting what may be inaccurate personal data about them, which may be processed by the data controller or others and which may jeopardise the employment prospects of an individual in the construction industry.

12. In view of the matters referred to above the Commissioner hereby gives notice that in exercise of his powers under section 40 of the Act he requires that, with immediate effect, the data controller shall:

(1) Refrain from using, disclosing or otherwise processing any personal data obtained from Mr Kerr unless:

(i) such processing is necessary for the purposes of the data controller complying with its obligations under the Act;

(ii) such processing is undertaken in connection with seeking or obtaining legal advice, or is undertaken for the purpose of, in the course of, or in connection with, any legal proceedings; or

(iii) the data controller has demonstrated to the satisfaction of the Commissioner that any such processing is strictly necessary for the purpose of maintaining work site safety and that the data controller has properly discharged its obligation under paragraph 2 of Part II at Schedule 1 to the Act to provide information to individuals who are the subject of any such processing.

(2) Ensure that if any personal data relating to recruitment is obtained from a source other than the data subject, the data subject is, in so far as is practicable, provided with the information specified in paragraph 2(3)(a), (b) and (c) at Part II of Schedule 1 to the Act in accordance with the First Data Protection Principle.

(3) Ensure that if any personal data relating to recruitment is disclosed to a third party for use in connection with the recruitment of workers, the data subject is, in so far as is practicable, provided with the information specified in paragraph 2(3)(a), (b) and (c) at Part II of Schedule 1 to the Act in
accordance with the First Data Protection Principle.

Right of Appeal

There is a right of appeal against this Notice to the Information Tribunal. Information about appeals is set out in the attached Annex 1.

Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Notice is served. If the notice of appeal is served late the Tribunal will not accept it unless it is of the opinion that it is just and right to do so by reason of special circumstances.

Dated the 3rd day of August 2009

Signed: …………………………………....

David Smith
Deputy Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF
ANNEX 1

THE DATA PROTECTION ACT 1998
(PART V, SECTION 40)

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any person upon whom an enforcement notice or an information notice has been served a right of appeal to the Information Tribunal (the “Tribunal”) against the notice.

2. If you decide to appeal and if the Tribunal considers:-
   a) that the notice against which the appeal is brought is not in accordance with the law; or
   b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

   the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Secretary to the Information Tribunal, Arnhem House Support Centre, PO Box 6987, Leicester, Leicestershire, LE1 6ZX.
   a) The notice of appeal should be served on the Tribunal within 28 days of the date on which notice of the Commissioner's decision was served on or given to you.
   b) If your notice of appeal is late the Tribunal will not accept it unless it is of the opinion that it is just and right to do so by reason of special circumstances.
   c) If you send your notice of appeal by post to the Tribunal, either in a registered letter or by the recorded delivery service, it will be treated as having been served on the Tribunal on the date on which it is received for dispatch by the Post Office.

4. The notice of appeal should state:-
   a) your name and address;
   b) the decision which you are disputing and the date on which the notice relating to such decision was served on or given to you;
c) the grounds of your appeal;

d) whether you consider that you are likely to wish a hearing to be held by the Tribunal or not;

e) if you have exceeded the 28 day time limit mentioned above the special circumstances which you consider justify the acceptance of your notice of appeal by the Tribunal; and

f) an address for service of notices and other documents on you.

In addition, a notice of appeal may include a request for an early hearing of the appeal and the reasons for that request.

5. By virtue of section 40(7), an enforcement notice may not require any of the provisions of the notice to be complied with before the end of the period in which an appeal can be brought and, if such an appeal is brought, the notice need not be complied with pending the determination or withdrawal of the appeal.

However, section 40(7) does not apply where the notice contains a statement that the Commissioner considers that the notice should be complied with as a matter of urgency.

Section 48(3) provides that where an enforcement notice contains a statement that the notice should be complied with as a matter of urgency then, whether or not you intend to appeal against the notice, you may appeal against –

(a) the Commissioner’s decision to include the statement in the notice, or

(b) the effect of the inclusion of the statement as respects any part of the notice.

6. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.