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7 *Attorneys for Plaintiff*

8

9   UNITED STATES DISTRICT COURT

10   NORTHERN DISTRICT OF CALIFORNIA

11   SAN FRANCISCO DIVISION

12

13 KEVIN POULSEN,   )
)
14   Plaintiff,   )   Civil Case No.: _____
)
15   v.   )   COMPLAINT FOR
)   INJUNCTIVE RELIEF
16   )
    UNITED STATES CUSTOMS AND   )
17 BORDER PROTECTION,   )
)
18   Defendant.   )
    _____)
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COMPLAINT FOR INJUNCTIVE RELIEF

1   This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

2 Plaintiff seeks injunctive and other appropriate relief, including the expedited processing and

3 release of agency records requested by Plaintiff from Defendant United States Customs and

4 Border Protection.

5   Plaintiff, by and through his attorneys, alleges as follows:

6

7   **PARTIES**

8   1. Plaintiff Kevin Poulsen is an individual residing in San Francisco, California, and is a

9 full-time journalist with Wired News, an online news magazine based in San Francisco,

10 California, that reports on technology, culture, business and politics.

11   2. Defendant United States Customs and Border Protection ("CBP") is a federal agency

12 within the Department of Homeland Security, a department of the Executive Branch of the

13 United States Government, with its headquarters located in Washington, D.C. CBP is an agency

14 within the meaning of 5 U.S.C. § 512(f).

15

16   **JURISDICTION AND VENUE**

17   3. This Court has both subject matter jurisdiction over this action and personal

18 jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B), 552(a)(6)(E)(iii). This Court

19 also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706.

20 Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

21

22   **GENERAL ALLEGATIONS**

23   4. Upon information and belief, a United States Customs and Border Protection

24 computer system stopped operating normally on August 18, 2005.

25   5. On August 19, 2005, the Associated Press reported: "Travelers arriving in the United

26 States from abroad were stuck in long lines at airports nationwide when a virus shut down an

27 U.S. Customs and Border Protection computer system for several hours, officials said."

28

COMPLAINT FOR INJUNCTIVE RELIEF

Associated Press, *Customs Computer Virus Strands Travelers* (Aug. 19, 2005) *available at* http://www.msnbc.msn.com/id/9002733/. (See attached Exhibit A).

6. The article cites Homeland Security spokesman Russ Knocke as saying that "the virus impacted computer systems at a number of airports Thursday night, including those in New York, San Francisco, Miami, Los Angeles, Houston, Dallas and Laredo, Texas," and cites CBP spokesman Zachary Mann as saying that "[t]he computer problem originated in the database systems located in Virginia and lasted from around 6 p.m. until about 11:30 p.m."

7. By letter dated August 22, 2005, Plaintiff requested from Defendant CBP "any documents (including but not limited to electronic records) detailing, describing, or concerning the August 18th, 2005 failure of a CBP computer system used to process passengers arriving on international flights, which failure resulted in delays in admitting international travelers in several U.S. airports, including those in Miami, New York, and San Francisco." (See attached Exhibit B).

8. Plaintiff asked for expedited processing of his request pursuant to 5 U.S.C. § 552(a)(6)(E), noting that he is a person "primarily engaged in disseminating information" and that there existed an "urgency to inform the public concerning actual or alleged Federal Government activity."

9. In support of his request for expedited processing, Plaintiff wrote: "The failed computer was reportedly responsible for security screening of international travelers entering the U.S. If, in fact, it fell prey to a computer virus, this would suggest strongly that a federal government computer system providing a vital security function was not adequately protected from outside attacks, and could be subject to continuing and serious compromises. The safety of U.S. borders is a matter of obvious and urgent interest to the public."

10. On September 23, 2005, a month after Plaintiff's initial request was made, Plaintiff received a telephone call from Erlinda Byrd, who identified herself as an employee of CBP's Office of Public Affairs and confirmed receipt by CBP of Plaintiff's request.

COMPLAINT FOR INJUNCTIVE RELIEF

1   11. Erlinda Byrd told Plaintiff that CBP officials believed that a search for the records

2 requested by Plaintiff would not produce any records which CBP would release to Plaintiff.

3 Byrd asked Plaintiff if he would voluntarily withdraw his request, and Plaintiff refused.

4   12. Upon information and belief, CBP had not conducted a search for records as of

5 September 23, 2005.

6   13. On December 9, 2005, Plaintiff contacted CBP by telephone to ascertain the status of

7 his request, and a CBP employee informed him that his request had been forwarded for

8 processing on September 8, 2005 to CBP's Office of Information and Technology.

9   14. Plaintiff then called CBP's Office of Information and Technology, and spoke with

10 Diane Hundertmark, who identified herself as the CBP official responsible for processing

11 requests made under the FOIA within the Office of Information and Technology. Hundertmark

12 told Plaintiff that she could not locate any record of his request.

13   15. By letter dated December 9, 2005, Plaintiff notified CBP that he had not received a

14 response to either his request for expedited processing or his request for records, and also related

15 the details of his conversations with Erlinda Byrd and Diane Hundertmark. (See attached

16 Exhibit C).

17   16. Plaintiff concluded, "I'm confident that your agency would not simply discard a

18 lawful FOIA request because of the inconvenience of fulfilling it. Please take every effort to

19 ascertain the status of my request, and provide me with an initial determination and a response to

20 my request for expedited processing by the end of the year."

21   17. In an article published on December 15, 2005, CNET News.com cited a Homeland

22 Security spokesman as saying that "contrary to some initial reports, there was no evidence that

23 [the August 18, 2005 computer failure] was caused by a virus." Anne Broache & Declan

24 McCullagh, *Aging Computers Hobble Homeland Security*, CNET News.com (December 15,

25 2005), *at* http://news.com.com/Aging+computers+hobble+ Homeland+ Security/2100-7348_3-

26 5995856.html. (See attached Exhibit D).

27

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COMPLAINT FOR INJUNCTIVE RELIEF

18. Upon information and belief, officials have not accounted for the discrepancy between the initial statement made by a Homeland Security spokesman in August and the subsequent statement by a Homeland Security spokesman made in December.

19. On January 31, 2006, five months after the initial request, Plaintiff received an undated letter from CBP's Office of Information and Technology denying his request for records. The letter informs Plaintiff that his request for records was "reviewed and considered," but it was "determined that additional information pursuant to the incident beyond what has already been provided to the media is exempt from disclosure in its entirety pursuant to 5 USC 552 (b)(2) as it is related solely to the internal administrative practices of [CBP]." The letter does not provide an estimate of the volume of the requested matter. (See attached Exhibit E).

20. The typed signature at the bottom of the denial letter names Cristin C. Fair, the Chief of Staff of the Office of Information and Technology, as the sender, but the letter is signed by Diane C. Hundertmark.

21. Upon information and belief, CBP did not conduct a search for records prior to sending the denial letter.

22. By letter dated February 2, 2006, Plaintiff appealed CBP's denial of his request and CBP's failure to respond to his request for expedited processing in accordance with both the appeal procedure given in the denial letter from the Office of Information and Technology and applicable CBP regulations. (See attached Exhibit F).

23. As grounds for his appeal, Plaintiff stated that CBP:

    (A)   Wrongly withheld records by citing an inapplicable exemption;

    (B)   Failed to provide records containing information that has been made public, even though there is an "intensified" public need for the records in light of "the media's inconsistent reporting;"

    (C)   Did not conduct an adequate search for records;

    (D)   Failed to comply with the statutory time limits regarding responses to requests made under the FOIA; and

    (E)   Failed to make a determination on Plaintiff's request for expedited processing.

COMPLAINT FOR INJUNCTIVE RELIEF

1   24. Upon information and belief, Plaintiff's appeal letter was received by CBP on

2 February 3, 2006.

3   25. To date, Defendant CBP has not responded to Plaintiff's appeal.

4   26. Plaintiff has exhausted the applicable administrative remedies.

5   27. Defendant CBP has wrongfully withheld the requested records from Plaintiff.

6
                                    CAUSE OF ACTION
7

8   **COUNT ONE – FAILURE TO MAKE REAONABLE EFFORTS TO SEARCH**
                              5 U.S.C. § 552(a)(3)(C)
9

10   28. Plaintiff incorporates by reference the allegations in Paragraphs 1- 27 as if fully set

11 forth in this Paragraph.

12   29. Upon information and belief, Defendant CBP did not "make reasonable efforts to

13 search for the records" requested by Plaintiff as required by 5 U.S.C. § 552(a)(3)(C).

14   30. Plaintiff has exhausted the applicable administrative remedies.

15   31. Plaintiff is entitled to injunctive relief requiring Defendant CBP to process

16 immediately the requested records in their entirety.

17

18   **COUNT TWO – FAILURE TO COMPLY WITH STATUTORY TIME LIMITS**
            5 U.S.C. §§ 552(a)(6)(A)(i), 552(a)(6)(A)(ii), 552(a)(6)(E)(ii)(II)
19

20   32. Plaintiff incorporates by reference the allegations in Paragraphs 1-31 as if fully set

21 forth in this Paragraph.

22   33. Defendant CBP failed to respond to Plaintiff's request for expedited processing, in

23 violation of 5 U.S.C. § 552(a)(6)(E)(ii)(II).

24   34. Defendant CBP failed to timely respond to Plaintiff's request for records, in violation

25 of 5 U.S.C. § 552(a)(6)(A)(i).

26   35. Defendant CBP failed to respond to Plaintiff's administrative appeal, in violation of

27 5 U.S.C. § 552(a)(6)(A)(ii).

28   36. Plaintiff has exhausted the applicable administrative remedies.

COMPLAINT FOR INJUNCTIVE RELIEF

1   37. Plaintiff is entitled to injunctive relief requiring Defendant CBP to immediately

2 release the requested records in their entirety.

3

4   **COUNT THREE – WRONGFUL WITHHOLDING OF RECORDS**
              5 U.S.C. § 552(b)(2)
5

6   38. Plaintiff incorporates by reference the allegations in Paragraphs 1-37 as if fully set

7 forth in this Paragraph.

8   39. Defendant CBP wrongfully withheld from release an unspecified number of

9 responsive records under 5 U.S.C. § 552(b)(2), claiming that the information contained in those

10 records "is related solely to the internal administrative practices of this agency."

11   40. Upon information and belief, the matter at issue is not "related solely to the internal

12 personnel rules and practices of [CBP]," and should not be subject to an exemption under 5

13 U.S.C. § 552(b)(2).

14   41. Plaintiff has exhausted the applicable administrative remedies.

15   42. Plaintiff is entitled to injunctive relief requiring Defendant CBP to release the

16 requested records in their entirety.

17

18   **COUNT FOUR – ARBITRARY AND CAPRICIOUS AGENCY ACTION**
              5 U.S.C. § 552(a)(4)(F)
19

20   43. Plaintiff incorporates by reference the allegations in Paragraphs 1-50 as if fully set

21 forth in this Paragraph.

22   44. The circumstances surrounding Defendant CBP's withholding of records from

23 Plaintiff "raise questions whether [CBP] personnel acted arbitrarily or capriciously with respect

24 to the withholding" under 5 U.S.C. § 552(a)(4)(F). The relevant circumstances include, but are

25 not limited to, the following:

26   (A) CBP failed to respond to Plaintiff's request for expedited processing;

27   (B) CBP failed to respond within the statutory time limit to Plaintiff's request for

28   records;

COMPLAINT FOR INJUNCTIVE RELIEF

1   (C) CBP failed to respond to Plaintiff's appeal;

2   (D) CBP employee Erlinda Byrd requested that Plaintiff withdraw his request for

3   records;

4   (E) CBP employee Diane Hundertmark told Plaintiff that his request could not be

5   located;

6   (F) Upon information and belief, CBP officials did not conduct a search for the

7   records requested by Plaintiff;

8   (G) Upon information and belief, CBP officials misplaced Plaintiff's request for a

9   period of time; and

10   (H) Upon information and belief, CBP officials did not make reasonable efforts to

11   process Plaintiff's request under 5 U.S.C. § 552, *et seq.*

12   45. Plaintiff has exhausted the applicable administrative remedies.

13   46. Plaintiff is entitled to a written finding that the circumstances surrounding the

14 withholding of records raise questions whether agency personnel acted arbitrarily or capriciously

15 with respect to the withholding.

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REQUESTED RELIEF

2   WHEREFORE, Plaintiff prays that this Court:

3   1. Order Defendant CBP to process immediately the requested records in their entirety;

4   2. Order Defendant CBP, upon completion of such processing, to disclose the requested

5 records in their entirety and make copies available to Plaintiff;

6   3. Issue a written finding that the circumstances surrounding the withholding raise

7 questions whether agency personnel acted arbitrarily or capriciously with respect to the

8 withholding, and refer the matter to the Special Counsel for investigation;

9   4. Award Plaintiff his costs and reasonable attorney's fees incurred in this action; and

10   5. Grant other such relief as the Court deems just and proper.

11

12 Dated: March 7, 2006   Respectfully submitted,

13

14   _____
                                            Lauren Gelman, State Bar No. 228734
15   Jennifer Stisa Granick, State Bar No. 168423
                                            Megan Adams, Certified Law Student
16   CENTER FOR INTERNET & SOCIETY
                                            CYBERLAW CLINIC
17   Crown Quadrangle
                                            559 Nathan Abbott Way
18   Stanford, California 94305-8610
                                            Telephone: (650) 724-3358
19   Facsimile: (650) 723-4426
                                            E-mail: gelman@stanford.edu
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COMPLAINT FOR INJUNCTIVE RELIEF

EXHIBIT A

MSNBC.com

Customs computer virus strands travelers
System back up after being shut down for several hours

MIAMI - Travelers arriving in the United States from abroad were stuck in long lines at airports nationwide when a virus shut down an U.S. Customs and Border Protection computer system for several hours, officials said.

Homeland Security spokesman Russ Knocke said the virus impacted computer systems at a number of airports Thursday night, including those in New York, San Francisco, Miami, Los Angeles, Houston, Dallas and Laredo, Texas.

Knocke said customs agents immediately switched to manual inspections. He declined to provide details on where the computer virus originated but said Friday the investigation remained open.

The worst delays appeared to be at Miami International Airport, where about 4,000 to 5,000 people waited to clear immigration, airport spokesman Greg Chin said. The passengers were not permitted to leave the area before then, but they all went through by midnight, he said. Everything was back to normal Friday.

Brian Hunt and his wife, who were visiting from Spain, said it took them nearly five hours to be processed.

"The agent was very charming, very nice and greeted us with a smile," he told The Miami Herald. "It was just an unfortunate thing, but these things happen. Who do we blame?"

The computer problem originated in database systems located in Virginia and lasted from around 6 p.m. until about 11:30 p.m., said Zachary Mann, spokesman for U.S. Customs and Border Protection in southern Florida.

At New York's airports, customs officials processed passengers by hand. Officials used backup computer systems to keep passengers moving at Los Angeles International Airport, where computers were down only briefly and delays from six flights lasted up to 2 1/2 hours.

"It was during a light time of travel for international passengers at LAX," said Mike Fleming, customs spokesman in Los Angeles. "All systems have been restored to full capacity."

URL: http://www.msnbc.msn.com/id/9002733/

EXHIBIT B

Kevin Poulsen
Wired News
660 Third Street, 4th Floor
San Francisco, CA 94107.

August 22nd, 2005

By Facsimile -- (202) 572-8727

Bureau of Customs and Border Protection
Chief, Disclosure Law Branch (Mint Annex)
1300 Pennsylvania Avenue, NW
Washington, DC 20229

RE: Freedom of Information Act Request
and Request for Expedited Processing

Dear FOIA/Privacy Act Officer:

This letter constitutes an expedited request under the Freedom of Information Act
("FOIA"), 5 U.S.C. § 552, and Bureau of Customs and Border Protection ("CBP")
regulations, 19 C.F.R. § 103.5, and is submitted by Kevin Poulsen, a journalist with
Wired News.

I am seeking any documents (including but not limited to electronic records) detailing,
describing or concerning the August 18th, 2005 failure of a CBP computer system used
to process passengers arriving on international flights, which failure resulted in delays in
admitting international travelers in several U.S. airports, including those in Miami, New
York, and San Francisco.

Request for Expedited Processing
This request warrants expedited processing because it pertains to a matter about which
there is an "urgency to inform the public concerning actual or alleged Federal
Government activity," and the request is made by a person "primarily engaged in
disseminating information." 5 U.S.C. § 552.

On August 19th, the Associated Press and numerous other media outlets reported on a
prolonged failure a day earlier of a CBP computer responsible for processing passengers
arriving on international flights. Media reports, quoting CBP spokesmen, attributed the
failure to a computer virus.

The failed computer was reportedly responsible for security screening of international
travelers entering the U.S. If, in fact, it fell prey to a computer virus, this would suggest
strongly that a federal government computer system providing a vital security function

was not adequately protected from outside attacks, and could be subject to continuing and serious compromises.

The safety of U.S. borders is a matter of obvious and urgent interest to the public, and the care with which the CBP protects computers used for that purpose is a qualifying federal government activity.

Request for "News Media" Fee Status
I am a professional full-time journalist with Wired News, an advertising-supported online news site dealing with technology.

I agree to pay reasonable duplication fees for the processing of this request in an amount not to exceed $50. Please notify me prior to incurring any expenses in excess of that amount.

Thank you for your consideration of this request. As applicable CBP regulations provide, I will anticipate your determination of my request for expedited processing within ten (10) calendar days. Should you have any questions about this request, please feel free to contact me at (415) 276-8411.

Under penalty of perjury, I hereby affirm that the foregoing is true and correct to the best of my knowledge.

Sincerely,

Kevin Poulsen
Senior Editor
Phone: 415-276-8411
Fax: 650-745-1227

EXHIBIT C

Kevin Poulsen
Wired News
500 Third Street, Suite 310
San Francisco, CA 94107.

December 9th, 2005

By Post and Facsimile — (202) 572-8727

Bureau of Customs and Border Protection
Chief, Disclosure Law Branch (Mint Annex)
1300 Pennsylvania Avenue, NW
Washington, DC 20229

RE: Freedom of Information Act Request
and Request for Expedited Processing

Dear FOIA/Privacy Act Officer:

I'm writing concerning my Freedom of Information Act ("FOIA") of August 22nd, 2005, a copy of which is attached.

To date I have not received an initial determination on my request, nor have I received an answer to my request for expedited processing. Those responses were due twenty (20) working days and ten (10) calendars days after receipt of my request, respectively. 5 U.S.C. § 552.

I spoke with your office today by telephone and was told that my request was forwarded to the Office of Information Technology for processing on September 8th, and that your office could provide me with no further details about the status of my request.
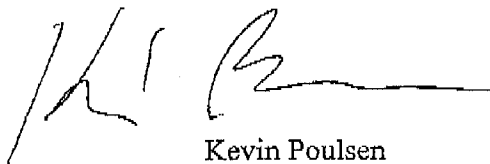
I then spoke with Diane Hundertmark at the Office of Information Technology. Ms. Hundertmark identified herself as the official responsible for handling FOIA requests within that office. She said she had no record of my request.

I know that your office received my request, because on September 23rd I was contacted by Erlinda Byrd from your agency's Office of Public Affairs. Ms. Byrd said that my request had been received, but that the official(s) processing it did not want to go to the trouble of conducting a records search that, in their view, would produce no information that they would be inclined to release, except for information that had already been released to the public and reported in the news. Ms. Byrd asked me to voluntarily withdraw my request, and I declined. She did not in any way indicate that her telephone call was intended as a denial of my request, therefore I expected that an official answer from your office would be forthcoming.

I'm confident that your agency would not simply discard a lawful FOIA request because of the inconvenience of fulfilling it. Please take every effort to ascertain the status of my request, and provide me with an initial determination and a response to my request for expedited processing by the end of the year.
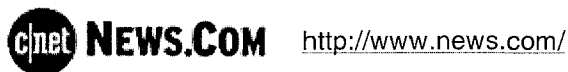
Please also note my new mailing address, which is at the top of this letter.

Sincerely,

Kevin Poulsen
Senior Editor
Phone: 415-276-8411
Fax: 650-745-1227

EXHIBIT D

cnet NEWS.COM   http://www.news.com/

Aging computers hobble Homeland Security

By Declan McCullagh
http://news.com.com/Aging+computers+hobble+Homeland+Security/2100-7348_3-5995856.html

Story last modified Thu Dec 15 06:38:06 PST 2005

Thousands of airline passengers unexpectedly found themselves stranded in line at U.S. border checkpoints in August, after a Department of Homeland Security computer crashed.

At Miami International, some 4,500 frustrated travelers waited in cramped conditions. Airport staff handed out bottles of water and coloring books with crayons for children during the wait for the computer, which checks identities, to come back up.

"This incident was extraordinary," said Greg Chin, an airport spokesman. "In other cases when the computers have been down, it has only been for less than half an hour."

The crash shuttered the government's main immigration database in Virginia, affecting scores of border entry points. The shutdown highlights the computer problems that the Homeland Security Department is grappling with, as it struggles to reshuffle myriad functions once performed by the now-defunct Immigration and Naturalization Service.

It has been a daunting task. Aging, incompatible systems and outdated processes have contributed to a backlog of approximately 1 million people waiting for a decision from the department's Citizenship and Immigration Services bureau. Computer problems at its Immigration and Customs Enforcement bureau caused a snafu in which student visa holders were jailed overnight or barred from entering the United States.
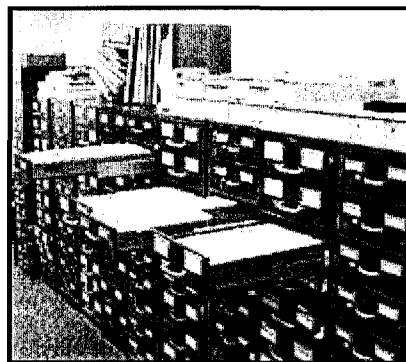

Index cards of biographical data

The U.S. Citizenship and Immigration Services's systems have come in for particular criticism from outside analysts and government auditors, who say these are simply not up to the task of serving the public, especially when coupled with a continuing reliance on paper forms. In some cases, for instance, information typed into one computer must be manually retyped into a second or third.

"All filings are paper-based, which means that everything you submit has to be keyed into the computer, which of course opens up the additional possibility of error, slows the process down and prevents some processes from being automated," said Crystal Williams, deputy director for programs at the American Immigration Lawyers Association.

The USCIS bureau has spent $280 million over the last two years as part of its "backlog initiative" to reduce the number of outstanding cases, but most of that has gone to hire temporary employees. Less than two percent, or $4.5 million, was devoted to computer upgrades. (The Department of Homeland Security's overall budget is $30.8 billion for fiscal year 2006.)

One problem is that applications for different types of immigration status are saved in separate records. These aren't interlinked, which means an application for a H1-B visa is not tied to the same person's application for a green card--causing more paperwork and delays, until the two records can be matched by hand.

Other procedures are equally inefficient. "Heaven forbid if an attorney should change their address," Williams said. "They have to send a change of address for every separate case they've got pending. (Once) I had between 500 and 1,000 cases pending

FEDS' TECH FOLLIES
FIRST in an occasional series
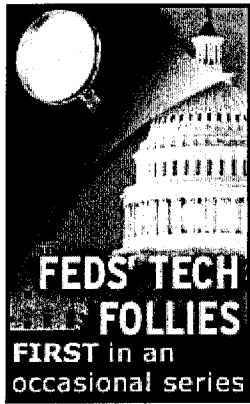
at one time."

Data stumbling blocks

The holdups can be attributed in part to the Homeland Security Department's antiquated computer systems. The agency's mainframes do not share data and are accessible only by some offices. An upgrade to Microsoft's Windows 2000 operating system failed because of application incompatibilities, which meant one division had to undertake a cumbersome reversion back to Windows 95.

In the case of the immigration bureau, there has never been a centralized electronic method for managing the more than 7 million applications that stream each year into 250 USCIS offices scattered across the country and abroad.

Instead, the bureau's outposts rely on about a dozen different systems designed to enter, store and track more than 50 types of forms that cover everything from citizenship applications to student and worker visas and adoptions.

Not one of the systems can talk with another, according to government reports, and not all offices are equipped to log into the systems they need to update records.

Even the bureau's two primary case-management systems, called CLAIMS 3 and CLAIMS 4, are accessible only to certain staff at certain offices. These rely on proprietary software developed by a string of contractors in the early 1990s, "do not share data, and are extremely expensive to modify," the ombudsman concluded. (CLAIMS stands for Computer Linked Application Information Management System.)

CLAIMS 3, for instance, runs on both client-server and mainframe platforms, and USCIS service centers across the country independently use six different versions of the system. On a nightly basis, employees upload the information they've entered that day into a central CLAIMS 3 mainframe--which essentially means that changes to files aren't available until the next day.

Homework pileup
While smaller than it was a couple years ago, the Department of Homeland Security's backlog of immigration cases is hardly disappearing.


Source: U.S. Citizenship and Immigration Services

All that suggests that a real dent in the USCIS backlog--which peaked at 3.8 million cases in January 2004 and has now settled at around 1 million--is unlikely to occur until the immigration bureau overhauls its geographically dispersed, often incompatible case-management processes.

"Despite repeated assessments and attempts to modernize, USCIS' processing of immigration benefits continues to be inefficient, hindering its ability to effectively carry out its mission," concluded a 56-page report (click for PDF) released this fall by the office of Homeland Security Inspector General Richard Skinner, who is responsible for investigating the department's 22 umbrella agencies.

A decade has elapsed since the last bureauwide upgrade of IT equipment. Some offices have adopted the practice of performing haphazard changes when budget money is left over, Skinner said, leading to a confusing patchwork of hardware and software across the bureau.

In his most recent annual report to Congress, Prakash Khatri, the immigration bureau's ombudsman, warned the Homeland Security Department's outdated technological infrastructure meant that "customer service is compromised." Khatri acts as a representative for people who have encountered problems.

The agency acknowledges that its computer systems remain a daunting obstacle. "The state of USCIS' current systems prevents it from implementing key initiatives, and has only allowed for incremental change," Tarrazzia Martin, the chief
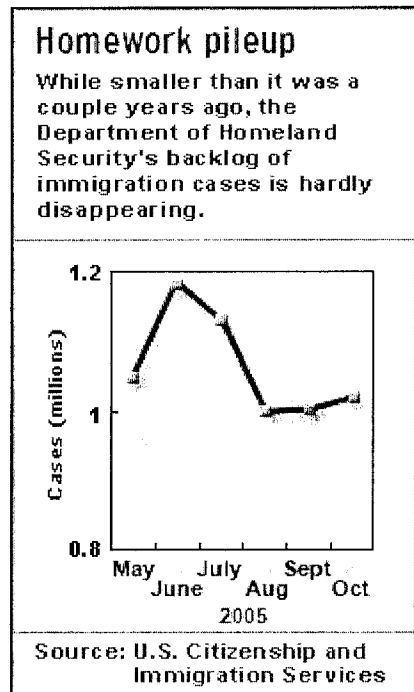
information officer for U.S. Customs and Immigration (USCIS), wrote in an e-mail interview with CNET News.com.

Inefficiencies yield delays, frustrations
Oleg Baklenov knows firsthand how paperwork delays by the USCIS can roil a technology worker's family life.

Baklenov, a 34-year-old Russian electrical engineer who came to the U.S. 11 years ago to earn his doctoral degree, currently has a visa that permits him to work for a company in Greensboro, N.C.

Three years ago, he applied for what's commonly known as a green card, a form of immigration status that would permit him to become a permanent resident and seek citizenship. But a technical difficulty in submitting his name to the FBI for a mandatory criminal background check has delayed the process, he said.

People with worker visas have to file extra paperwork--which can take several months to process--to leave and re-enter the United States. Confident that his green-card application would be processed, Baklenov decided not to undertake the task of submitting those additional forms.

But now his ailing grandmother has been admitted to a Czech hospital, and the unexpected delay has effectively barred Baklenov from leaving the country to visit her. "The system will be more efficient if one computer system can communicate with different agencies and request all the checks that they need," said Baklenov, who is representing himself in a federal lawsuit filed in North Carolina, but is hoping for an out-of-court resolution.

National Records Center in Lee's Summit, Missouri

William Strassberger, a USCIS spokesperson, said he's not sure what caused Baklenov's problems and said the agency was still waiting for the security check. "If he wanted to make a request for advance parole for emergency medical reasons on behalf of his grandmother, it should be possible to do," Strassberger said. "Usually, we recommend submitting an application four weeks ahead of time, but if it's a situation where it requires urgent travel, it's possible to do that."

Barriers to progress
The situation is complicated by the ripple effects of the federal law creating the Department of Homeland Security, signed by President Bush in 2002, which carved the former Immigration and Naturalization Service into three slices.

Border patrol and customs agents formed the new U.S. Customs and Border Protection unit, while the bureaucracy for processing immigration-related requests was renamed U.S. Citizenship and Immigration Services. The similarly named U.S. Immigration and Customs Enforcement division now includes former INS "detention and removal" agents, federal air marshals and the Federal Protective Service.

Michael Garcia, an assistant secretary at the Department of Homeland Security, has likened the integration process to "trying to change the engine in an airplane in mid-flight." In testimony to the Senate in March, Garcia said: "We have had to build a new agency almost from the ground up--bringing together divisions from four separate agencies into a single functioning unit, and melding the cultures and missions of various units into a unified whole."

Large, distributed government systems are too often victims of poor planning, said Peter Neumann, a principal scientist in the computer science lab at SRI International, a not-for-profit research institute.

"What is needed is a set of requirements that really makes sense in the first place and an architecture that is capable of satisfying those requirements--a very serious software engineering discipline to ensure a system is not only going to meet those requirements but be evolvable over time," said Neumann, who has served on technical advisory committees for the IRS and the Government Accountability Office.

Referring to the August crash that left travelers waiting in line, Homeland Security Department spokesman Jarrod Agen said that some problems are inevitable. "They have computer glitches from time to time due to the complexity of the system, and they're not a frequent thing, but they do happen on occasion, and that was one instance of it." Agen said that contrary to some

initial reports, there was no evidence it was caused by a virus.

Plans for change

The USCIS didn't set up its own centralized information technology office until March 2004, a year after Homeland Security was formed. It now says it has a multiyear "IT Transformation Strategy"--but officials have refused to disclose the cost or the anticipated timetable.

Nor is a single document publicly available. Instead, the plans are scattered around in multiple documents, such as a "mission needs" statement, presentations, white papers, and so on, spokesperson Strassberger said. The bureau is currently in the process of awarding contracts and cannot discuss the details, he said.

Some attempts at modernization have been made. It's now possible, for instance, for immigration applicants to file nine types of forms electronically and to check their status online. But because the e-filing system can't talk to any of the existing case management systems that employees use, those employees must manually retype those forms into the appropriate database.

In November, the department completed a "refresh" of workstations in its California service center, installing more than 1,200 new workstations, printers and monitors, and "modernizing and standardizing" its network, according to a December bureau newsletter. Similar updates are scheduled for several more offices in 2006.
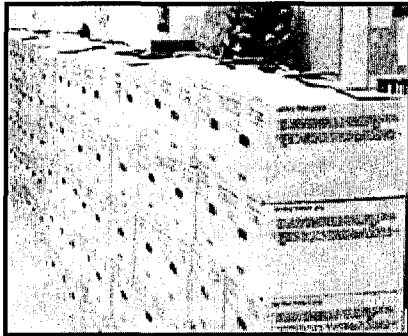
Boxes of files ready for shipment to National Records Center

Robert Divine, the bureau's acting deputy director, said the organization is committed to making the fixes, but it can't do so without a big budget increase.

Because most of the bureau's revenue comes from application fees, not from the federal government's pockets, "the type of significant, up-front funding that will be required for fully modernizing information technology is not clearly within USCIS' means," Divine said in a September letter to the Department of Homeland Security's assistant inspector general for information technology.

On ICE

Problems have also plagued computers used by the U.S. Immigration and Customs Enforcement bureau. Since 2003, schools and student-exchange programs have been required to use a Internet-based tool known as the Foreign Student and Exchange Visitor Information System (SEVIS) to store and track personal information about foreign students before, during and after their stay in the United States.

University administrators testifying before a congressional committee have complained that SEVIS frequently lost data, could not handle large batches of information submitted at once, did not provide real-time access to records. The system would sometimes result in documents--many of a confidential nature--inexplicably being printed out on computers at completely different schools.

In its most recent evaluation of SEVIS, published in March, the Government Accountability Office acknowledged that the system is now receiving fewer gripes from educational organizations. GAO said that's partly due to better help desk staffing and training, and new software releases. However, ICE has not resolved all of the system's glitches, it said.

Meanwhile, immigrants like Baklenov continue to wait for results. "We're trying to do as much as we could thru the phone and through talking to our friends in the Czech Republic and asking them to help," he said, referring to his grandmother. "She's still in the hospital and we're trying to do the best for her--from overseas, unfortunately."

EXHIBIT E

U.S. Department of Homeland Security
Washington, DC 20229

**U.S. Customs and
Border Protection**

Mr. Kevin Poulsen
Wired News
500 Third Street, Sutie 310
San Francisco, CA 94107

Dear Mr. Poulsen:

This is in response to your Freedom of Information Act (FOIA) request that we received in our office on December 30, 2005. Please allow me to apologize for the confusion in regards to your original request of August 22, 2005.

Your request for additional documentation related to the U.S. Customs and Border Protection computer system outage of August 18, 2005 as reported by the Associated Press and other media outlets such as the Miami Herald has been reviewed and considered. It has been determined that additional information pursuant to the incident beyond what has already been provided to the media is exempt from disclosure in its entirety pursuant to 5 USC 552 (b)(2), as it is related solely to the internal administrative practices of this agency.

If you consider this to be a denial of your request, you may file an appeal to the Assistant Commissioner, Office of Regulations and Rulings, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW, Washington, DC 20229. Your appeal must be made in writing within 35 days after the date of this notification.

Thank you for your interest in U.S. Customs and Border Protection. If you have any questions or concerns, please contact Ms. Diane Hundertmark at (202) 344-2719.
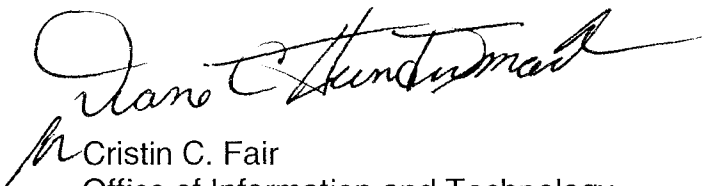
Sincerely,

Cristin C. Fair
Office of Information and Technology
Chief of Staff

EXHIBIT F

Kevin Poulsen
Wired News
500 Third Street, Suite 310
San Francisco, CA 94107

February 2nd, 2006

Assistant Commissioner
Office of Regulations and Rulings
U.S. Customs and Border Protection
1300 Pennsylvania Avenue, NW
Washington, DC 20229

RE: Freedom of Information Act Appeal

Dear Assistant Commissioner:

This is an appeal under the Freedom of Information Act ("FOIA"). 5 U.S.C. §522(a)(6).

On August 22nd, 2005, I made my initial request for documents under the FOIA from the Bureau of Customs and Border Protection ("CBP"). I requested documents relating to the August 18th, 2005 failure of a CBP computer system used to process airline passengers arriving on international flights. In that letter, I also requested expedited processing pursuant to the statute.

On January 31st, 2006, I received a notice of determination on my initial request from the CBP's Office of Information and Technology in an undated letter signed by Ms. Diane Hundertmark. The determination was a denial of my request for documents. A copy of the response is enclosed. Without the intent of limiting any future action, I appeal on the following grounds:

(1) The claimed exemption is inapplicable to the documents requested. In its denial, the CBP claimed an exemption from the FOIA's requirement of disclosure under 5 U.S.C. §522(b)(2), which exempts documentation that is "related solely to the internal personnel rules and practices of an agency." The Supreme Court has determined that this section is meant to exempt from disclosure documents relating to "matters of daily routine" that could not reasonably be of interest to the public. *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). Far from this model, I have requested documents relating to a significant incident that is of great interest to the public. The failure of a government computer system that regulates U.S. borders can hardly be called a trivial matter.

(2) The CBP failed to provide me with documents containing information that has been made public. In the response, Ms. Hundertmark acknowledged that information "has already been provided to the media." The CBP should not have

withheld documents that substantiate their statements to the press. There is a need for documentation corroborating the information publicly released, and this need is intensified by the media's inconsistent reporting on the August 18th incident. Please see the enclosed news articles which attribute the computer failure to different sources.

(3) The CBP did not conduct an adequate search for records. The FOIA requires that an agency "make reasonable efforts to search for records." 5 U.S.C. §522(a)(3)(C). The response indicates that my request was "reviewed and considered" but does not indicate that a search was conducted. In addition, Ms. Hundertmark claims that my request was for "additional" documentation, suggesting that at least some documentation was available. Given the language of the response and the fact that no documents were provided or listed as withheld, I can only conclude that a reasonable search was not conducted. This is a violation of the FOIA.

(4) The CBP failed to make an initial determination on my FOIA request within the statutory time limit. An agency must make a determination on any FOIA request within 20 days of receiving such request, and must provide immediate notice to the requester. 5 U.S.C. §522(a)(6)(A)(i). I received notice of the determination on my request 5 months after I submitted it. This undue delay in processing is clearly in violation of the FOIA.

(5) The CBP failed to make a determination on my request for expedited processing. The FOIA requires that within 10 days of the date of the request, an agency make a determination on whether to provide expedited processing and provide notice of that determination to the requester. 5 U.S.C. §522(a)(6)(E)(ii)(II). As my request was dated August 22nd, 2005 and I have not received an answer to date, this FOIA requirement was not met.

Thank you for your consideration of this appeal. I will expect a reply within 20 days pursuant to 5 U.S.C. §522(a)(6)(A)(ii). Should you have any questions about this appeal, please feel free to contact me at (415) 276-8411.

Sincerely,

Kevin Poulsen
Senior Editor
Phone: 415-276-8411
Fax: 650-745-1227