



James K. Davis
Office of the Solicitor General
Department of Justice
950 Pennsylvania Avenue, NW
Room 6627
Washington, DC 20530-0001

June 27, 2012

Re: Freedom of Information Act Request

Dear Mr. Davis:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A), for the release of documents from the Office of the Solicitor General. EarthRights International (ERI) hereby requests copies of the following records:

- Any post-decisional documents and communications referencing or discussing the decision of Attorney General Eric Holder or Deputy Solicitor General Sri Srinivasan (hereinafter collectively “the individuals”) whether or not to recuse themselves from working on, discussing, or developing legal or policy positions of the U.S. government in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S.) (hereinafter “*Kiobel*”) that were created between March 5, 2012, and the date of receipt of this request.
- Any documents and communications that indicate whether the individuals worked on or were involved in discussions relating to the *amicus curiae* brief submitted by the U.S. government in *Kiobel* on June 13, 2012, or otherwise reflect their work or participation in that brief, that were created between March 5, 2012, and the date of receipt of this request.
- Any documents and communications reflecting the participation of any person working within the Executive Office of the President, including the Office of the White House Counsel or the National Security Staff, regarding work on *Kiobel* that were created between March 5, 2012, and the date of receipt of this request.

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- Any documents submitted by any business or businesses, or trade association, or the representative of a business or businesses, or trade association to any U.S. Government entity or official regarding *Kiobel* or the Alien Tort Statute, 28 U.S.C. § 1350 (hereinafter “ATS”), between March 5, 2012, and June 13, 2012.
- Any records of meetings or documents referring to any meetings between any business or businesses, trade association, or the representative of a business or businesses or trade association, with any U.S. Government entity regarding *Kiobel* or the ATS, between March 5, 2012, and June 13, 2012.

We have attached a copy of the U.S. *amicus curiae* brief in *Kiobel* for your reference, as well as a number of newspaper articles and other media sources referring to this brief and the *Kiobel* case.

Segregability

As the FOIA requires, please release all reasonably segregable nonexempt portions of documents.

Non-Applicability of Exemptions

Please note that these requests do not fall under FOIA Exemption 5 because they are not intended to require the release of any material that would qualify as privileged attorney work product. They do not seek pre-decisional, “deliberative” material – the actual content of any person’s advice or opinions prior to taking a decision on recusal is not sought – but rather information regarding coordination and participation prior to the decision, and communications regarding the decision after it was made.¹ In other words, the requests are aimed squarely at determining *who* participated in a critical decision regarding the U.S. government’s position on human rights accountability, *whether* persons with potential conflicts of interest were recused from the discussion or considered recusing themselves, and *what* the final rationale was for the decision on recusal.² Moreover, to the extent that documents submitted to the Government by businesses or written to businesses by the Government are responsive to these requests, they are not covered by the Exemption because the businesses had “their own, albeit legitimate, interests in mind” and were “seeking a Government benefit . . . [.]”³

These requests also do not fall under FOIA Exemption 4 because they are not intended to require the production of any material that might constitute confidential business information. To the

¹ Cf. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (Exemption 5 “covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” (internal quotations omitted)).

² See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152 (1975) (distinguishing between communications made before a decision, which are privileged, and those made after a decision, which are not).

³ See *Department of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 12 & n.4 (2001); U.S. Dept. of Justice, *Freedom of Information Act Guide* 361 (2009).

extent that any documents containing such information are responsive to these requests, the confidential information may be redacted.⁴

Request for Fee Waiver

ERI requests a waiver of all fees for this request pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Disclosure of the requested information to us is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in our commercial interest. ERI is a non-profit organization that uses legal and policy tools to seek accountability for human rights and environmental abuses, primarily those committed by corporations operating abroad. It has no commercial interests and seeks this information solely to promote public understanding of the process by which the U.S. government developed its position in *Kiobel*.

The impetus for these FOIA requests is the decision of the U.S. Department of Justice to file an *amicus curiae* brief on behalf of the U.S. government in *Kiobel* on June 13, 2012. This brief calls on the U.S. Supreme Court to dismiss *Kiobel* and all cases that involve allegations under the ATS against foreign corporations for their complicity in human rights abuses committed by foreign governments. It also calls on the Court to create additional, unprecedented barriers to ATS cases involving conduct committed abroad, including a presumption of *forum non conveniens*. The U.S. position as stated in this brief, if adopted, would operate to the benefit of former clients of Attorney General Eric Holder and Deputy Solicitor General Sri Srinivasan, both of whom represented companies that are defendants in pending ATS cases.

The ATS is a statute that gives foreigners access to U.S. federal courts in lawsuits involving violations of universally recognized norms of international human rights law. Release of the requested information would be in the public interest because it will shed light on decisions on U.S. government policy relating to the use of the ATS as a tool for the legal accountability of corporations for committing human rights abuses abroad. The *Kiobel* case involves torture, extrajudicial killing, and crimes against humanity in which Royal Dutch Petroleum Co. was allegedly complicit as part of a scheme to ensure access to low-cost oil reserves in Nigeria.⁵

Accountability for gross human rights abuses is manifestly in the public interest, as evidenced by the status of the U.S. as a party to the Convention Against Torture, the Geneva Conventions, and other important international human rights instruments providing for universal jurisdiction over universally recognized violations of international human rights law. U.S. courts have recognized that when such abuses are committed, it affects the international order, and the responsible parties can be classified as “enem[ies] of all mankind,” in the same manner that pirates were considered the problem of all nations in the 18th century when the ATS was first enacted.⁶

⁴ 5 U.S.C. § 552(b) (2009) (Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection); See, e.g., *Davin v. U.S. Dept. of Justice*, 60 F.3d 1043, 1052 (3d Cir. 1995).

⁵ See *Kiobel v. Royal Dutch Petroleum Co.*, 2004 U.S. Dist. LEXIS 28813, at *2-10 (S.D.N.Y. Mar. 12, 2004).

⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-733 (2004) (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)).

Moreover, the U.S. government has recognized that corporate accountability for human rights abuses is a public duty. As Jose Fernandez, Assistant Secretary of State for Economic and Business Affairs, has recently said:

[I]t is important for States to govern justly and effectively, such that individuals are protected not only from misconduct by the State but also from non-State actors, including business enterprises. Our conviction regarding the State "duty to protect" is grounded in States' moral and political imperative to engage in good governance, including by addressing properly acts of abuse by private actors.⁷

The U.S. also adheres to the OECD Guidelines for Multinational Enterprises, which since 2011 have included a Human Rights chapter that emphasizes both the state's duty to protect against negative human rights by corporations and the corporate duty to respect human rights.⁸ And the U.S. government's position on a law that enables accountability for such abuses is of particular interest to the public because the courts pay close attention to the opinions of the Executive Branch on matters that touch on foreign affairs.⁹

In addition, information about the process by which the U.S. government developed its position in the *Kiobel* case would contribute to the public's understanding of the operations of government because it implicates a fundamental question of the influence of corporate interests in public decision making. At least two key figures in the Justice Department appear to have conflicts of interest with regard to the reach and scope of the ATS. Prior to entering government, Attorney General Eric Holder represented Chiquita Brands International in an ATS lawsuit involving human rights allegations in Colombia,¹⁰ and Deputy Solicitor-General Sri Srinivasan represented Rio Tinto Corp.,¹¹ Exxon Mobil Corp.,¹² and Ford Motor Corp.¹³ in ATS suits alleging human rights violations in Papua New Guinea, Indonesia, and South Africa, respectively. These individuals were lead counsel in these lawsuits right up until the time that they entered the government. All four lawsuits are still ongoing, all four will likely be affected by the Supreme Court's eventual decision in *Kiobel*, and the U.S. government's stated position in its *amicus curiae* brief in *Kiobel* would dictate that all four lawsuits be resolved in favor of the individuals' former clients. The question of whether Mr. Holder or Mr. Srinivasan recused themselves – or if not, should have recused themselves – from the development of the brief could thus shed significant light on the influence of corporate interests on government officials who have prior and potential future ties to powerful companies.

⁷ Jose W. Fernandez, Assistant Secretary, Bureau of Economic and Business Affairs, Remarks at the U.S. Government Implementation Workshop on UN Guiding Principles on Business and Human Rights (Apr. 30, 2012).

⁸ OECD Guidelines for Multinational Enterprises Ch. 4 (2011 ed.).

⁹ See, e.g., *Gonzalez v. Reno*, 212 F.3d 1338, 1353 (11th Cir. 2000) ("in no context is the executive branch entitled to more deference than in the context of foreign affairs."); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 858 (D.C. Cir. 2010) ("it is well-established that courts must be cautious about interpreting an ambiguous statute to constrain or interfere with the Executive Branch's conduct of national security or foreign policy.").

¹⁰ *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, No. 08-01916-MD, (S.D. Fla.); See also Carol D. Leonnig, *In Terrorism-Law Case, Chiquita Points to U.S.*, Wash. Post (Aug. 2, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/01/AR2007080102601.html>.

¹¹ *Sarei v. Rio Tinto, PLC*, No. 02-56256 (9th Cir.).

¹² *Doe v. Exxon Mobil Corp.*, No. 01-1357 (D.D.C.), No. 09-7125 (D.C. Cir.).

¹³ *In re South African Apartheid Litig.*, 02 MDL 1499 (SAS) (S.D.N.Y.); *Balintulo v. Daimler AG*, 09-2778-cv(L) (2d Cir.).

If a complete fee waiver is not available, ERI's request should be treated as that of a non-profit, non-commercial organization that is seeking information for a public use for the purpose of assessing fees.

ERI is willing to pay fees for this request up to a maximum of \$200.00. If you estimate that the fees will exceed this limit, please inform us before processing this request.

If you have any questions regarding this request, please contact me at 202-466-5188 x113, or jonathan@earthrights.org.

I look forward to receiving your response within the twenty day statutory time period. Thank you for your consideration of this request.

Sincerely,

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