Subject: Your application for access to documents - Ref GestDem No 2014/6027

Dear Sir/Madam,

We refer to your e-mail of 10 December 2014 in which you make a request for access to documents, registered under the above mentioned reference number.

Your application concerns documents related to an infringement procedure pursued by the Commission against Hungary, in accordance with Article 258 of the TFEU, concerning Hungary’s failure to fulfil its obligations under Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe.

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents and Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, I regret to inform you that your application cannot be granted, as disclosure is prevented by exception to the right of access laid down in Article 4 of this Regulation. Article 4 (2) third indent states that the institutions shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

The documents which you seek to obtain relates to an ongoing investigation regarding a possible infringement of EU law (infringement No 2008/2193). Disclosure of the documents requested would undermine the protection of the purpose of the ongoing investigation.
In the matter of investigations of alleged infringements, sincere co-operation and a climate of mutual confidence between the Commission and the Member State concerned are required to allow both parties to engage in a process of negotiation and compromise with the search for a settlement of a dispute without bringing it before the Court of Justice. The safeguarding of this objective warrants the refusal of access to the documents you requested.

This has been confirmed by the jurisprudence of the Court of First Instance. In its judgement of 11 December 2001 in the case T-191/99 the Court held that "the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgement of the Court of Justice. The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access to the letters of formal notice and reasoned opinions drawn up in connection with the Article 226 EC proceedings on the ground of protection of the public interest relating to inspections, investigations and court proceedings".

In addition, in its judgement of 14 November 2013 in joint cases C-514/11 P and C-605/11 P (paragraph 63), the Court held that: "the disclosure of the documents concerning an infringement procedure during its pre-litigation stage would, in addition, be likely to change the nature and progress of that procedure, given that, in those circumstances, it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State concerned putting an end to the infringement alleged, in order to enable European Union law to be respected and to avoid legal proceedings".

We have considered whether partial access could be granted to the documents requested. However, according to our assessment, the documents are entirely covered by the exception under Article 4(2), third indent.

The exceptions laid down in Article 4(2) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the document. Having carefully examined your request in the light of Article 4(2) of Regulation 1049/2001 and Article 6(1) of Regulation 1367/2006, I have been unable to identify in this particular case the existence of an overriding public interest which could justify the disclosure of the requested document. I also note that you have not put forward any arguments demonstrating the existence of a public interest capable of overriding the public interest protected by Article 4(2) of Regulation No 1049/2001.

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.
Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/327
B-1049 Brussels
or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

Karl Falkenberg