



HUNTON & WILLIAMS LLP  
1751 PINNACLE DRIVE  
SUITE 1700  
MCLEAN, VIRGINIA 22102

TEL 703 • 714 • 7400  
FAX 703 • 714 • 7410

STUART A. RAPHAEL  
DIRECT DIAL: 703-714-7463  
EMAIL: sraphael@hunton.com

April 15, 2011

FILE NO: 37100.010095

**By E-Mail & U.S. Mail**

John E. Foster  
City Attorney  
City of Falls Church  
300 Park Ave  
Falls Church, VA 22046

**Re: Falls Church's Proposed Water Rate Increase**

Dear John:

Paragraph 3 of Judge Ney's Final Decree, and § 13.09 of the City's Charter, 1995 Va. Acts ch. 655, require that the City set its water rates so that "receipts" are "equal to expense." Judge Ney wrote in his accompanying letter opinion that this provision prohibits building a "return on equity" into the rates themselves:

That section continues to require that the water rates are to be set with "receipts equal to expense," without building any surplus *or* "return on equity" into the rates themselves.

(Letter Opinion of Jan. 6, 2010, at 4 (emphasis added).)

According to the summary posted on your website, the City's proposed water rates include a 7.8% "return on equity" that has been included in the revenue requirement that the new rates are designed to meet.<sup>1</sup>

Could you please explain why, if these proposed rates are adopted, it would not violate the City's Charter and the injunction in paragraph 3 of the Final Decree?

We have looked at the City's website unsuccessfully for a copy of the complete MFSG water rate study. Under Code § 2.2-3704, could you kindly send me a color copy by email in

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<sup>1</sup> See Municipal & Financial Services Group, Water Rate Study Findings and Recommendations at 11, available at [http://www.fallschurchva.gov/Content/Government/Departments/EnvironmentalServices/WaterRateStudy\\_2011Mar28.pdf](http://www.fallschurchva.gov/Content/Government/Departments/EnvironmentalServices/WaterRateStudy_2011Mar28.pdf)

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John E. Foster, Esq.  
April 15, 2011  
Page 2

electronic format? Alternatively, you could simply post a copy of the complete report on the City's website, as allowed under § 2.2-3704(G), and let me know where to find it.

Thanks for your prompt attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Stuart A. Raphael". The signature is written in a cursive, flowing style.

Stuart A. Raphael  
Counsel, Fairfax County Water Authority

cc: Members, Fairfax Water  
Clerk, City of Falls Church



# City of Falls Church

Office of the City Attorney

Harry E. Wells Building - 300 Park Avenue, Ste 302E  
Falls Church, VA 22046-3332

John E. Foster  
City Attorney  
Office: (703) 248-5010  
Fax: (703) 248-5146  
jfooster@fallschurchva.gov

April 22, 2011

Stuart A. Raphael, Esquire  
Hunton & Williams, LLP  
1751 Pinnacle Drive, Suite 1700  
McLean, Virginia 22102

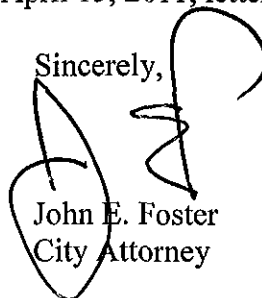
Re: Document request dated April 15, 2011

Dear Stuart:

This letter responds to your correspondence dated April 15, 2011, in which you ask for a color copy by e-mail of the complete MFSG water rate study. I anticipate that I will have in my possession a color copy of the complete MFSG report on Monday, April 25, 2011, and will forward it to you as soon as possible by e-mail in electronic format.

I am responding to the other issues raised in your April 15, 2011, letter, under separate cover.

Sincerely,



John E. Foster  
City Attorney

cc: Members, City Council  
Wyatt Shields, City Manager



# City of Falls Church

Office of the City Attorney

Harry E. Wells Building - 300 Park Avenue, Ste 302E  
Falls Church, VA 22046-3332

John E. Foster  
City Attorney  
Office: (703) 248-5010  
Fax: (703) 248-5146  
jfooster@fallschurchva.gov

April 22, 2011

Stuart A. Raphael, Esquire  
Hunton & Williams, LLP  
1751 Pinnacle Drive, Suite 1700  
McLean, Virginia 22102

Re: Letter dated April 15, 2011

Dear Stuart:

I write this letter in response to your correspondence dated April 15, 2011, in which you ask me to “explain why, if [the City’s] proposed [water] rates are adopted, it would not violate the City’s Charter and the injunction in Paragraph 3 of the Final Decree?”

Paragraph 3 of the Court’s Final Decree, entered on January 6, 2010, provides that

The City of Falls Church must comply with § 13.09 of the City Charter . . . in setting water rates that, in the judgment of the City Council, will result in receipts equal to *expense* (including any future expense of the water system). In setting its water rates, the City may not include as an “expense” any surplus to be transferred to the general fund in violation of paragraph two of this Decree.

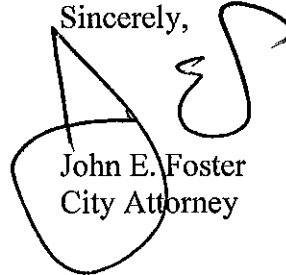
(Emphasis added.) The “return on equity” referenced in the City’s proposed water rates will remain in the water utility fund and, as I understand it, is a valid expense for municipal utilities under generally accepted rate making principles. The American Waterworks Association agrees that a “return on equity” that remains in the water utility fund is a legitimate expense for rate making purposes. Manual M1, at page 40.

The Court ordered the City to set rates so that receipts equal expense. Your client’s expert, Chris Woodcock, explained to Judge Ney that a “return on equity” that remains in the water fund is “an expense of the utility” for rate-making purposes. (Trial Tr., Day 2, at 406). The City’s proposed rates are set so that receipts equal expense and do not contemplate transfers of any surplus to any fund, including the general fund. In using a “return on equity” expense that stays in the water fund, the City’s proposed rate increase complies with the City Charter and the express language of Paragraph 3 of the Final Decree.

April 22, 2011  
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I invite you to let us know if you have any other specific concerns about the City's proposed rates, so the City may take them into account before the City Council takes action on the proposed rates. I assure you that the City is acting in good faith and has no interest in violating the Court's January 6, 2010, order.

Sincerely,

A handwritten signature in black ink, appearing to be 'John E. Foster', is written over the typed name. The signature is stylized and somewhat abstract, with a large loop on the left side and a smaller loop on the right side.

John E. Foster  
City Attorney

cc: Members, City Council  
Wyatt Shields, City Manager



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STUART A. RAPHAEL  
DIRECT DIAL: 703-714-7463  
EMAIL: sraphael@hunton.com

April 23, 2011

FILE NO: 37100.010095

**By E-Mail & Fax**

John E. Foster  
City Attorney  
City of Falls Church  
300 Park Ave  
Falls Church, VA 22046

**Re: Falls Church's Proposed Water Rate Increase**

Dear John:

Thank you for your letter of April 22, 2011, in which you explain the City's view that it is permitted to include a return on equity in its revenue requirement when setting water rates as long as it does not transfer that embedded return to the general fund.

Your response ignores Judge Ney's letter opinion, which stated clearly that § 13.09 of the City's charter "continues to require that the water rates are to be set with 'receipts equal to expense,' without building any . . . 'return on equity' into the rates themselves." (Letter Opinion of Jan. 6, 2010, at 4 (emphasis added).)

In addition to overlooking Judge Ney's specific ruling on this subject, your letter also misconstrues the trial testimony of Chris Woodcock. Mr. Woodcock explained that "the total revenues [of the water system] *do not include return on investment*" (Tr. 411:12-14) (emphasis added). He noted how rate analysts sometimes confuse this point. (Tr. 412-14.) Even under the utility basis for calculating rates, "[f]or a municipal utility, the revenue requirements are always determined on a cash basis." (Tr. 414:7-9; 417:9-13.) And in response to Judge Ney's questions, he again said: "For municipal utilities, the overall requirements, the overall amount that they are recovering from rates do not, should not include any provision for a return on investment in terms of the overall amount they recover, both inside and outside." (Tr. 487:6-11.)

You say that the AWWA M1 Manual supports your position that a return on equity may be included in the revenue requirement when calculating rates as long as that amount "remains in the water utility fund." But your position overlooks that the M1 Manual itself distinguishes between municipal and non-municipal utilities. The Manual makes clear that, even when using

John E. Foster, Esq.  
April 23, 2011  
Page 2

the utility basis for determining rates, “[a] government-owned utility . . . determines its total revenue requirements, or costs of service, on a cash-needs basis.” AWWA, *Principals of Water Rates, Fees, and Charges*, M1 Manual at 65 (5th ed. 2000) (emphasis added). The M1 Manual thus tracks Chris Woodcock’s testimony. That is not surprising, since Mr. Woodcock chaired the AWWA subcommittee that produced the manual.

Of course, even if the M1 Manual supported the City’s position (which it doesn’t), it would not trump Judge Ney’s finding that the City’s own charter does not permit a return on equity to be built into the revenue requirements.

Your letter invites us to raise “any other specific concerns about the City’s proposed rates, so the City may take them into account before the City Council takes action on the proposed rates.” For reasons that remain a mystery, however, the City has not posted MFSG’s rate study on its website, nor have you provided a copy within the five-working days required by Code § 2.2-3704(B).

Without a chance to review and digest the rate study, we are not in position to respond to Friday’s invitation. Two aspects of the proposal surprised us, however. First, the rate study does not appear to have addressed the City’s tap fees, which have remained unchanged for years and appear to be below-cost. This appears to have the effect of hiking the commodity charge to subsidize future capital expenses that should properly be borne by new development. The subsidy disproportionately burdens Fairfax County ratepayers, since they comprise approximately 92% of the City’s customer base.

Second, it is surprising that the City is proposing such a significant increase in the commodity rate when the City’s previous rates were generating \$2.4 million or more in surplus profits that, under the final decree, must now be kept in the water fund. Frankly, in light of that important fact, we were expecting to see a reduction in the City’s water rates, not a steep increase.

Very truly yours,



Stuart A. Raphael  
Counsel, Fairfax County Water Authority

cc: Members, Fairfax Water

---

**From:** John Foster [mailto:jfoster@fallschurchva.gov]  
**Sent:** Monday, April 25, 2011 4:03 PM  
**To:** Raphael, Stuart  
**Subject:** Tonight's Hearing on Water Rates

Stuart:

Please be advised that the City will be deferring tonight's hearing on its water rates until June 27, 2011, in order to consider fully the points raised in your letter of Saturday, April 23, 2011. In your letter dated April 15, 2011, you requested "a [color] copy of the complete MFSG water rate study" under the Freedom of Information Act. In light of the deferral of this matter to June 27, 2011, the City does not have a complete rate study to provide in response to your request of April 15, 2011. To the extent that you are seeking working papers of the City Manager, those documents are exempt from disclosure under Section 2.2-3705.7(2) of the Freedom of Information Act.

Best regards,

John

John E. Foster, City Attorney  
City of Falls Church, Virginia  
300 Park Avenue, Suite 302E  
Falls Church, Virginia 22046  
(703) 248-5010  
(703) 248-5146  
[jfoster@fallschurchva.gov](mailto:jfoster@fallschurchva.gov)

THIS COMMUNICATION CONTAINS CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS AND IS NOT TO BE RELEASED TO THE PUBLIC. THIS COMMUNICATION IS EXEMPT FROM THE DISCLOSURE PROVISIONS OF THE VIRGINIA FREEDOM OF INFORMATION ACT. VA. CODE ANN. SEC. 2.2-3705.1(2) (SUPP. 2010).



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STUART A. RAPHAEL  
DIRECT DIAL: 703-714-7463  
EMAIL: [sraphael@hunton.com](mailto:sraphael@hunton.com)

May 9, 2011

FILE NO: 37100.010095

**By E-Mail & Fax**

John E. Foster  
City Attorney  
City of Falls Church  
300 Park Ave  
Falls Church, VA 22046

**Re: Falls Church's Proposed Water Rate Increase and the MFSG Rate Study**

Dear John:

Thank you for your email of April 25, 2011, in which you state that the City is (i) postponing action on the water rate increase until June 27 and (ii) refusing to provide a copy of MFSG's rate study in the form it took as of April 25 (the "MFSG Report"). Your email implies that a new "version" of the report is being prepared to support the June 27 agenda item. I am interested, however, in the version that the City now refuses to produce. The City's refusal to provide the MFSG Report violates the Virginia Freedom of Information Act.

To begin with, you agreed in your April 22nd letter to provide a copy of the MFSG Report in response to my April 15th FOIA request. Even assuming for the sake of argument that the document could have been withheld as exempt under the "working papers" exception, the City exercised its option to produce it on the fifth and last working day allowed under Code § 2.2-3704(B)(2). You didn't say that production was "not practically possible" nor did you invoke any statutory exemption. Having expressly exercised the option to produce the MFSG Report, the City cannot refuse to do so.

Moreover, the "working papers" exemption you have cited applies only to "records prepared *by or for* [the chief executive] for *his personal or deliberative use*." Code § 2.2-3705.7(2) (emphasis added). The MFSG Report, by contrast, was the subject of a public RFP that nowhere mentioned that it was being prepared for Mr. Shields's "personal or deliberative use."

And if that were not enough, we understand that the MFSG Report was already provided to the members of the City Council for their use at public meetings where the proposed rate increase was discussed (on March 28, April 7, and April 25), as well as to the members of the Public Utilities Committee for their meeting on March 23, 2011. Statements were made at some of

# HUNTON & WILLIAMS

John E. Foster, Esq.

May 9, 2011

Page 2

these meetings that the MFSG Report had been supplied to members. Mr. Shields said at the Council's April 7th work session, for instance, that the Council was "familiar" with it. Indeed, we find it hard to believe that the Council or the Public Utilities Committee would have voted to endorse the rates recommended by MFSG if they had *not* had the opportunity to actually read the document.

Code § 2.2-3707(F) provides that "all materials furnished to members of a public body for a meeting shall be made available for public inspection at the same time such documents are furnished to the members of the public body." In addition, the "working papers" exemption is lost when the document is disseminated to others. 1983 Va. AG LEXIS 84, 1983 Op Att'y Gen Va 724.

Accordingly, you have no legal basis to withhold the MFSG Report and should produce it immediately.

In addition, for each person to whom the MFSG Report has been distributed, please produce a copy of all emails, letters, and memoranda by which the MFSG Report was transmitted to that person.

Very truly yours,



Stuart A. Raphael

cc: Clerk, City of Falls Church  
Members, Fairfax Water



# City of Falls Church

Office of the City Attorney

Harry E. Wells Building - 300 Park Avenue, Ste 302E  
Falls Church, VA 22046-3332

John E. Foster  
City Attorney  
Office: (703) 248-5010  
Fax: (703) 248-5146  
jfoster@fallschurchva.gov

May 13, 2011

Stuart A. Raphael, Esquire  
Hunton & Williams  
1751 Pinnacle Drive, Suite 1700  
McLean, Virginia 22102

Re: Your letter dated May 9, 2011

Dear Stuart:

I write this letter in response to your correspondence dated May 9, 2011, in which you erroneously claim that the City is violating the Virginia Freedom of Information Act ("FOIA"), has "no legal basis to withhold the MFSG Report[,] and should produce it immediately." You also make a new FOIA request for "a copy of all e-mails, letters, and memoranda by which the MFSG Report was transmitted." I will respond to that request under separate cover on Monday, May 16, as provided by FOIA.

You state several reasons for your baseless claim, and I will address each in turn.

First, you assert that "the City is refusing to produce a copy of MFSG's rate study in the form it took as of April 25." The particular document to which you refer in your letter of May 9, 2011, is not the same document you requested in your April 15, 2011, letter. For this reason, your assertion is false and appears to be an effort by you to rewrite your April 15 FOIA request, after the fact. On April 15, you asked for "a color copy by email" of the "complete MFSG water rate study." The City did not have in its possession, and still does not have in its possession, "a copy" of the "complete MFSG water rate study" in color, or otherwise. In addition, I cannot find any correspondence from you in which you state that you were requesting the rate study "in the form it took as of April 25." If I have misplaced some of your correspondence, please let me know, because I have nothing that suggests you ever made a FOIA request for any document "in the form it took as of April 25."

Second, you state, again incorrectly, that I "agreed to provide a copy of the MFSG Report in response to [your] April 15 FOIA request." I did not agree. Instead, in my April 22, letter to you, I stated that "I *anticipate* that I will have in my possession a color copy of the complete MFSG report on Monday, April 25, 2011." (emphasis added.) On April 15, 2011, and April

May 13, 2011

Page 2

23, 2011, you sent me letters that made it all too clear that you are preparing for yet another round of legal challenges to the City's water system. Out of an abundance of caution, on April 25, the City deferred the hearing in this matter to June 27, 2011, to allow its rate expert, MFSG, an opportunity to fully consider the threats made in your letters before completing its report. As a result of the deferral, there was no MFSG report provided to the City on April 25 or since, and I have no "copy" of the "complete MFSG water rate study" to give you, in color or otherwise. I made it clear in my April 22, 2011, letter to you that I understood you were requesting a "color copy" of the "complete" report, and I never received any communication from you that corrected my understanding and informed me that you were not really requesting a document that was both a "color copy" and the "complete" report. I took you at your word that, as an attorney, you chose your words very carefully, and now you are attempting to deconstruct and remake your request, while at the same time casting aspersions on the City by baselessly claiming a violation of the law.

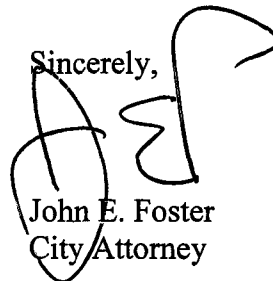
Third, you state that "the 'working papers' exemption to FOIA does not apply here." Again, this is incorrect, as the City Manager and his staff needed to review documents from MFSG, other than the non-existent complete report, and deliberate on those other documents in determining whether to recommend a change in the City's water rates.

Fourth, you state that "we understand that the MFSG Report was already provided to the members of the City Council for their use at public meetings where the proposed rate increase was discussed." This is simply false. The MFSG Report has not been provided to City Council. Please let me know the facts upon which you base that assertion, because your understanding is not true to the best of my knowledge.

Therefore, the City is clearly not violating FOIA. I cannot give you a document that the City does not have. I hope that this clarifies the matter for you, and resolves this kerfuffle over a non-existent document.

In closing, I would like to remind you that after we both signed the February 25, 2010, Consent Decree resolving Fairfax Water's multi-million dollar antitrust suit against the City (for a fraction of the amount we were sued for), the City and Fairfax Water issued a joint press release saying "[b]oth entities welcome the conclusion of this case so that they can resume focus on the business of best serving the public." The City is trying to do just that, but I have serious doubts about whether you are truly interested in "best serving the public," given the tenor of your letters of April 15, April 23, and May 9, which instead threaten more litigation against the City, thereby necessitating the payment of significant sums of money to outside counsel.

Sincerely,

A handwritten signature in black ink, appearing to be "John E. Foster". The signature is stylized and somewhat cursive, with a large loop at the end.

John E. Foster  
City Attorney



# City of Falls Church

Office of the City Attorney

Harry E. Wells Building - 300 Park Avenue, Ste 302E  
Falls Church, VA 22046-3332

John E. Foster  
City Attorney  
Office: (703) 248-5010  
Fax: (703) 248-5146  
jfooster@fallschurchva.gov

May 16, 2011

Stuart A. Raphael, Esquire  
Hunton & Williams  
1751 Pinnacle Drive, Suite 1700  
McLean, Virginia 22102

Re: FOIA request dated May 9, 2011

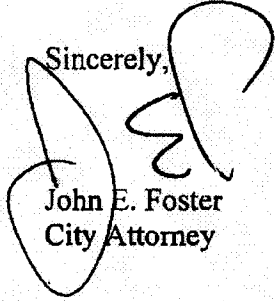
Dear Stuart:

This will respond to your request to me under the Virginia Freedom of Information Act ("FOIA") dated May 9, 2011 (copy attached), for "a copy of MFSG's rate study in the form it took as of April 25 (the 'MFSG Report') and "for each person to whom the MFSG Report has been distributed . . . a copy of all emails, letters, and memoranda by which the MFSG Report was transmitted to that person."

Please be advised that pursuant to Va. Code Ann. § 2.2-3704(B)(4), it is not practically possible to provide the requested records or to determine whether they are available by today because we are still determining the form the draft MFSG Report took as of April 25, and we are still in the process of determining each person to whom the draft MFSG Report as of that particular date may have been distributed.

Therefore, the City shall have an additional seven work days from today to respond to your FOIA request.

Sincerely,

  
John E. Foster  
City Attorney

cc: Wyatt Shields, City Manager  
Kathleen C. Buschow, City Clerk  
J. Patrick Taves, Esquire



# City of Falls Church

Office of the City Attorney

*Harry E. Wells Building - 300 Park Avenue, Ste 302E  
Falls Church, VA 22046-3332*

John E. Foster  
City Attorney  
Office: (703) 248-5010  
Fax: (703) 248-5146  
jfooster@fallschurchva.gov

May 25, 2011

Stuart A. Raphael, Esquire  
Hunton & Williams  
1751 Pinnacle Drive, Suite 1700  
McLean, Virginia 22102

Re: FOIA request dated May 9, 2011

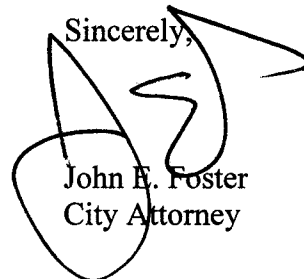
Dear Stuart:

This will respond to your request to me under the Virginia Freedom of Information Act ("FOIA") dated May 9, 2011 (copy attached), for "a copy of MFSG's rate study in the form it took as of April 25 (the 'MFSG Report') and "for each person to whom the MFSG Report has been distributed . . . a copy of all emails, letters, and memoranda by which the MFSG Report was transmitted to that person." In a letter to you dated May 16, 2011 (copy attached), I invoked the seven additional work days authorized by Va. Code Ann. § 2.2-3704.

First, the MFSG Report in the form it took as of April 25, 2011, and all documents associated therewith, would be "working papers" under Va. Code Ann. § 2.2-3705.7(2). Accordingly, they will not be produced. Please be aware that the document that is the subject of your request is a draft report and has never been transmitted to the City Council. Once the report in question has been finalized and disseminated to the City Council and the City Manager, I would be pleased to provide you with a copy of the final report.

Second, pursuant to Va. Code Ann. §§ 2.2-3705.1(2) and (3), the "emails, letters and memoranda" are protected by the attorney-client privilege and/or are work product compiled specifically for use in the litigation threatened in your letters to me dated April 15, April 23, and May 9. Therefore, they will not be produced.

Sincerely,



John E. Foster  
City Attorney