

Kendig, Megan (OFM)

From: Mattos, Liz (OFM) on behalf of Schumacher, David (OFM)
Sent: Monday, May 01, 2017 9:18 AM
To: OFM Budget
Subject: FW: Contingency Planning for State Agency Operations
Attachments: AG re OST operations continuity.pdf

From: Snyder, Brenda (TRE) **On Behalf Of** Davidson, Duane (TRE)
Sent: Friday, April 28, 2017 1:02 PM
To: Schumacher, David (OFM) <David.Schumacher@ofm.wa.gov>
Subject: RE: Contingency Planning for State Agency Operations

Good afternoon,

Thank you for the memo regarding contingency planning for operations. My office has determined that the briefing written by the Attorney General's Office in 2013 for this office still applies. I have attached the briefing for your records.

Thank you,

Duane A. Davidson
State Treasurer

From: Mattos, Liz (OFM) **On Behalf Of** Schumacher, David (OFM)
Sent: Tuesday, April 25, 2017 1:11 PM
To: Alvarado-Ramos, Alfie (DVA) <Alfie@DVA.WA.GOV>; Batiste, John <john.batiste@wsp.wa.gov>; Bellon, Maia (ECY) <maib461@ECY.WA.GOV>; Bonlender, Brian (COM) <Brian.Bonlender@commerce.wa.gov>; Cockrill, Michael (Watech) <michael.cockrill@watech.wa.gov>; Danner, Dave (UTC) <ddanner@utc.wa.gov>; Daugherty, Bret D. (MIL) <Bret.Daugherty@mil.wa.gov>; Guerin, Tracy (DRS) <TracyG@drs.wa.gov>; Hunter, Ross (DEL) <ross.hunter@del.wa.gov>; Kohler, Pat (DOL) <PKohler@DOL.WA.GOV>; Lashway, Patricia (DSHS) <LashwPK@dshs.wa.gov>; Liu, Chris (DES) <chris.liu@des.wa.gov>; Meotti, Michael (WSAC) <MichaelM@wsac.wa.gov>; Millar, Roger <millarr@wsdot.wa.gov>; Papiez, Gloria (DFI) <Gloria.Papiez@dfi.wa.gov>; Peinecke, Dale (ESD) <DPeinecke@ESD.WA.GOV>; Sacks, Joel (LNI) <sacj235@LNI.WA.GOV>; Sahandy, Sheida (PSP) <sheida.sahandy@psp.wa.gov>; Sandison, Derek (AGR) <DSandison@agr.wa.gov>; Schumacher, David (OFM) <David.Schumacher@ofm.wa.gov>; Sinclair, Stephen D. (DOC) <sdsinclair@DOC1.WA.GOV>; Smith, Vikki (DOR) <VikkiS@DOR.WA.GOV>; Teeter, Dorothy F. (HCA) <dorothy.teeter@hca.wa.gov>; Unsworth, James W (DFW) <Jim.Unsworth@dfw.wa.gov>; Wiesman, John (DOH) <jmwiesman@doh.wa.gov>; Bridges, George (Evergreen) <Bridges@Evergreen.edu>; Brown, Marty (SBCTC) <mbrown@sbctc.edu>; Cauce, Ana Mari <cauce@u.washington.edu>; Cullinan, Mary (EWU) <president@ewu.edu>; Francis, Paul <pfrancis@cop.wsu.edu>; Gaudino, James <gaudino@cwu.edu>; Randhawa, Sabah (WWU) <sabah.randhawa@wwu.edu>; Schultz, Kirk (WSU) <kirk.schulz@wsu.edu>; Adams, Kate <kadams@bta.state.wa.us>; Bales, David (CJTC) <dbales@cjtc.state.wa.us>; Braseth, Svein (TRE) <Svein.Braseth@tre.wa.gov>; Brown, Marty (SBCTC) <mbrown@sbctc.edu>; Carney, Tim <Tim.Carney@northwestmuseum.org>; Clark, Mark (SCC) <MClark@scc.wa.gov>; Deschamps, Elaine (CFC) <elaine.deschamps@cfc.wa.gov>; Griffith, Reema <GriffiR@wstc.wa.gov>; Herman, Kim <kim.herman@wshfc.org>; Hoch, Don (PARKS) <Don.Hoch@PARKS.WA.GOV>; Kilmer, Jennifer <jennifer.kilmer@wshs.wa.gov>; Lee, Lorraine (OAH) <lorraine.lee@oah.wa.gov>; Lerch, Steve (ERFC) <SteveL@dor.wa.gov>; Lopez, Evelyn (PDC)

<evelyn.lopez@pdc.wa.gov>; Mason, Dean A. (DOC) <damason@DOC1.WA.GOV>; Matthews, Lindsay (COS) <lindsay.matthews@salaries.wa.gov>; Moore, Doug <Doug.moore@whrc.state.wa.us>; Moredo-Burich, John (WSHS) <john.moredo-burich@northwestmuseum.org>; Murr, Donna <donnam@whcfa.wa.gov>; Nelsen, Steve (LEOFF) <steve.nelsen@leoff.wa.gov>; Ortiz, Sharon (HUM) <sortiz@hum.wa.gov>; Papadakis, Eleni <epapadakis@wtb.wa.gov>; Probart, Ashley <probara@fmsib.wa.gov>; Rahr, Sue (CJTC) <srahr@cjtc.state.wa.us>; Sellars, Mike (PERC) <Mike.Sellars@perc.wa.gov>; Smith, Brigitte (BVFF) <BrigitteS@bvff.wa.gov>; Stav, Brenda (LSDFA) <Brenda@lsdfa.org>; Threedy, David <threedy@biia.wa.gov>; Trujillo, Dave (GMB) <dave.trujillo@wsgc.wa.gov>; Unsworth, James W (DFW) <Jim.Unsworth@dfw.wa.gov>; Weber, Jay <Weberj@crab.wa.gov>; Wendt, Rodney <wedfa@wshfc.org>; Whitmarsh, Theresa (SIB) <Theresa.Whitmarsh@sib.wa.gov>; Wolniakowski, Krystyna <krystyna.wolniakowski@gorgecommission.org>; Wright, Teri (COS) <Twright@Salaries.WA.GOV>; Basas, Carrie (GOV) <carrie.basas@gov.wa.gov>; Berntsen, Teresa (OMWBE) <TeresaB@omwbe.wa.gov>; Bill, Craig (GOIA) <cbill@goia.wa.gov>; Brooks, Allyson (DAHP) <Allyson.Brooks@DAHP.WA.GOV>; Carter, Nina (ELUHO) <ninac@eluh.wa.gov>; Cottingham, Kaleen (RCO) <Kaleen.Cottingham@rco.wa.gov>; Dowd, Patrick (GOV) <Patrick.Dowd@ofco.wa.gov>; Durand, LouOma (DSB) <louoma.durand@dsb.wa.gov>; Everett, Aaron (GOV) <aaron.everett@gov.wa.gov>; Grondel, Darrin (WTSC) <dgrondel@wtsc.wa.gov>; Hanan, Karen (ARTS) <karen.hanan@arts.wa.gov>; Hanson, Bill (LOT) <BHanson@walottery.com>; Huan, Rick <rick.huan@wsd.wa.gov>; Itti, Michael. (CAPAA) <michaeli@capaa.wa.gov>; Kerney, Charlotte (CAA) <ckerney@caa.wa.gov>; Lee, Lorraine (OAH) <lorraine.lee@oah.wa.gov>; Lynch, Bill (UTC) <bilynch@utc.wa.gov>; McCallum, Scott <scott.mccallum@wssb.wa.gov>; Olsen, Russ (PLIA) <russ.olsen@plia.wa.gov>; Papadakis, Eleni <epapadakis@wtb.wa.gov>; Powell, Marta (BTA) <mpowell@bta.state.wa.us>; Prince, Ed (CAA) <eprince@caa.wa.gov>; Roesler, Rich (GOV) <rich.roesler@gov.wa.gov>; Rongen, Kecia L. (DOC) <klrongen@DOC1.WA.GOV>; Rushford, Jane E (LCB) <jane.rushford@lcb.wa.gov>; Satterlund, Charles (ACB) <Charless@cpaboard.wa.gov>; van der Lugt, Lisa (CHA) <lisa.vanderlugt@cha.wa.gov>; Williams, Linda (BIA) <linda.williams@biia.wa.gov>; Ferguson, Bob (ATG) <RWF@ATG.WA.GOV>; Franz, Hilary (DNR) <Hilary.Franz@dnr.wa.gov>; Inslee, Jay (GOV) <Jay.Inslee@gov.wa.gov>; Kreidler, Commissioner (OIC) <MikeK@OIC.WA.GOV>; McCarthy, Pat (SAO) <mccarthyp@sao.wa.gov>; Odiorne, Jim (OIC) <JimO@OIC.WA.GOV>; Rooney, Keri (SAO) <rooneyk@sao.wa.gov>; Wyman, Kim (SOS) <kim.wyman@sos.wa.gov>; YOUNG, LENNY (DNR) <LEONARD.YOUNG@dnr.wa.gov>; jamila.thomas@k12.wa.us; chris.reykdal@k12.wa.us; cyrus.habib@ltagov.wa.gov; Postman, David (GOV) <David.Postman@gov.wa.gov>; Schochet, John (LTG) <john.schochet@ltagov.wa.gov>; Davidson, Duane (TRE) <Duane.Davidson@tre.wa.gov>; Myers, Shawn (TRE) <Shawn.Myers@tre.wa.gov>
Cc: Marcus, Roselyn (OFM) <Roselyn.Marcus@OFM.WA.GOV>; Crawford, Jim (OFM) <Jim.Crawford@ofm.wa.gov>; Thomas, Ralph (OFM) <Ralph.Thomas@OFM.WA.GOV>; Schumacher, David (OFM) <David.Schumacher@ofm.wa.gov>; Wicker, Kelly (GOV) <kelly.wicker@gov.wa.gov>

Subject: Contingency Planning for State Agency Operations

Please see attached. (Electronic transmittal only.)

Liz Mattos for
David Schumacher, Director
Office of Financial Management
(360) 902-0526
www.ofm.wa.gov



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

June 19, 2013

The Honorable James L. McIntire
State Treasurer
PO Box 40200
Olympia, WA 98504-0200

Dear Treasurer McIntire:

You have requested an opinion on the following paraphrased questions:

- 1. In view of the responsibilities assigned to the office of the state treasurer, may the treasurer's office continue to operate notwithstanding article VIII, section 4 of the Washington Constitution and RCW 43.88.130 if a 2013-15 operating budget is not enacted by July 1, 2013?**
- 2. If so, may the obligations incurred by operating the treasurer's office after June 30, 2013, be paid out of a subsequent appropriation?**

BRIEF ANSWER

Yes, to both questions. A limited class of state agencies and programs would be required to continue to operate even in the unlikely event that the legislature fails to enact a state operating budget before the beginning of the next fiscal biennium. These include agencies funded through the already-enacted transportation budget, agencies funded through unappropriated sources, and a limited set of agencies performing functions that are mandated by constitutional principles or federal law. To the extent that other agencies continue to operate for these reasons, the office of the state treasurer is also legally required to continue to operate to the extent that the treasurer's functions are indispensable to the functions of those other agencies. I see no legal impediment to paying related costs from a subsequent appropriation, provided, of course, that doing so is consistent with the terms of a subsequent budget act.¹

¹ I have completed this opinion extremely quickly because of the short time available for engaging in contingency planning and the severe and immediate consequences that could occur if no budget is enacted. Your request for an expedited opinion was reasonable under these unusual circumstances, but I do not anticipate that future occasions will arise for completing an opinion within such a condensed timeframe.



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BACKGROUND

Before turning to your questions, it is helpful to review the context in which your questions are posed. As of the date of this informal opinion, the legislature has not yet adopted an operating budget for the 2013-15 fiscal biennium. The appropriations set forth in the 2011-13 fiscal biennium expire June 30, 2013. Laws of 2011, 1st Spec. Sess., ch. 50, § 1. Whether or not an operating budget is enacted, a limited range of state programs will continue to function and will require that payments be processed. In posing your questions, you provided the following background as to the role of your office regarding public funds:

The Office of the State Treasurer (OST), by law, has the responsibility to receive, keep, and disburse public funds. No payments, regardless of whether they are constitutionally mandated, required by federal law, or required as the result of a fiduciary obligation, can be made out of the state treasury or treasury trust accounts if OST cannot operate. In addition, OST cannot meet its obligation to keep public funds safe and secure through proper investment and cash management if it cannot operate.

The Washington Constitution establishes the treasurer as an independently elected executive branch officer. Const. art. III, § 1. As you further explain, the treasurer manages, among other functions, all state tax receipts and state transportation funds, and maintains ongoing compliance with federal tax and securities laws. State law requires the treasurer to provide daily oversight of state finances. *See, e.g.*, RCW 43.08.135 (the treasurer “shall maintain at all times” sufficient liquidity to meet the operational needs of state government); *see also* RCW 43.01.050, .060 (requiring the treasurer to oversee the daily remittance of taxes and fees).

State funds cannot be disbursed out of the treasury for any purpose without action by the treasurer. As you explain, your office “manages several hundred funds and accounts, some in the state treasury and some in the custody of the treasurer.” These treasurer’s trust funds are not subject to legislative appropriation, but are commingled and invested for cash management purposes with treasury funds. RCW 43.79A.040.

ANALYSIS

- 1. In view of the responsibilities assigned to the office of the state treasurer, may the treasurer’s office continue to operate notwithstanding article VIII, section 4 of the Washington Constitution and RCW 43.88.130 if a 2013-15 operating budget is not enacted by July 1, 2013?**

You ask whether your office may remain open in the absence of a state operating budget for various purposes that support state functions that do not directly depend upon the enactment

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of a state operating budget. For the reasons set forth below, you not only *may* keep your office open for such purposes, but you are legally *required* to do so.

The Washington legislature has never failed to enact an operating budget before the beginning of a new fiscal biennium.² I assume that they will timely pass a budget again this year, but I provide this opinion in response to your request in order to facilitate contingency planning in the unlikely event that an operating budget is not in place on July 1, 2013. *See* RCW 43.88.020(7) (the ensuing fiscal biennium begins July 1, 2013). This office has offered similar advice under similar circumstances in the past, and does so now in order to assist with your planning. *See* AGLO 1977 No. 11 (considering the status of obligations incurred in the absence of a state operating budget).

Two general principles guide the consideration of your question. The first principle is the general rule that legislative appropriations are necessary in order to spend money or incur financial obligations. The second principle is that, despite the first principle, under the circumstances in which you pose your question, there clearly will be agencies and programs within state government that must continue to operate during the next biennium whether or not the legislature timely adopts an operating budget.

The Washington Constitution states:

No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law[.]

Const. art. VIII, § 4. Thus, as a general rule, an appropriation is necessary in order to pay money out of the treasury. *Washington Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 365, 70 P.3d 920 (2003). The Washington Supreme Court has long recognized the purpose of this rule as being “to secure to the legislative department of the government the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government.” *Id.* (quoting *State ex rel. Peel v. Clausen*, 94 Wash. 166, 173, 162 P. 1 (1917)).

The legislature has established a corollary principle by statute, prohibiting any agency from incurring financial obligations except pursuant to appropriation. RCW 43.88.130 (“No agency shall expend or contract to expend any money or incur any liability in excess of the amounts appropriated for that purpose[.]”); *see also* AGLO 1977 No. 11, at 2-3 (describing the

² As an historical note, in 1951 the state was without a budget for two brief periods, first after the governor vetoed a budget enacted shortly before the new biennium began, and again after the Washington Supreme Court invalidated the operating budget enacted after the veto. Don Brazier, *History of the Washington Legislature 1854-1963*, at 148 (2000) (describing the events of 1951 relating to the operating budget) (also available online at <http://www.leg.wa.gov/History/Legislative/Documents/HistoryOfTheLeg.pdf> (last visited June 19, 2013)); *see also Power, Inc. v. Huntley*, 39 Wn.2d 191, 204-05, 235 P.2d 173 (1951) (invalidating the state operating budget).

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general requirement for appropriations to expend funds or incur financial obligations). Accordingly, “agencies may not continue to spend once their appropriation has been exhausted.” *Washington Ass’n of Neighborhood Stores*, 149 Wn.2d at 365.

If these were the only applicable legal provisions, the answer to your question would be that you may not keep your office open in the absence of a state operating budget providing appropriations to fund its operation. As noted, however, under the circumstances there clearly will be agencies and programs within state government that continue to operate, and the services of your office will be indispensable to the performance of their legally-mandated functions. This is the case for several reasons, the first of which is that the legislature has enacted a transportation budget, setting forth appropriations for transportation agencies and transportation purposes. Laws of 2013, ch. 306. Agencies funded through that legislation will, accordingly, continue to function, whether or not an operating budget is enacted.

Additionally, the limitation of article VIII, section 4 of the Washington Constitution and RCW 43.88.130 apply only to funds subject to appropriation. Some agencies and programs operate from unappropriated funds, and presumably will continue to do so without regard to the enactment of an operating budget. For example, the legislature has established certain trust funds by statute, from which agencies can expend funds for designated purposes without appropriation. “Said trust funds shall include, but shall not be limited to, the accident fund, medical aid fund, retirement system fund, Washington state patrol retirement fund and unemployment trust fund.” RCW 43.88.180. More generally, funds placed into unappropriated special accounts may be disbursed without appropriation. *See King Cnty. v. Taxpayers of King Cnty.*, 133 Wn.2d 584, 605, 949 P.2d 1260 (1997) (discussing distribution to local governments of tax revenue deposited into a special fund for that purpose); *see also Mun. of Metro. Seattle v. O’Brien*, 86 Wn.2d 339, 345, 544 P.2d 729 (1976) (describing “the commonsense interpretation by this court that the Treasurer may be made custodian of particular funds of a proprietary nature which are held for a specific purpose” and not subject to appropriation). The legislature has also authorized the creation, with approval of the office of financial management, of certain funds outside the state treasury. RCW 43.88.195. Notable examples include funds available to cover some expenditures of state institutions of higher education. RCW 43.88.195; *see also* AGLO 1977 No. 11, at 4 (describing universities as an example of agencies authorized to expend from “local funds”).

Additional obligations for state agencies to remain open and incurring financial obligations could arise from constitutional requirements or from provisions of federal law. For example, courts have recognized that prisoners who are involuntarily confined in state penal institutions have rights to certain basic services, such as food and medical care.³ Similarly, patients involuntarily confined to other state institutions, such as those for the mentally ill, may

³ *See, e.g., LeMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993) (food); *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987) (food); *see also Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (medical care).

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also have constitutional rights to continued care despite a budgetary impasse. *See* Const. art. XIII, § 1; *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982). I do not attempt in this analysis to list comprehensively all instances in which constitutional rights to continued care or service may give rise to a constitutional obligation for particular agencies to continue at least some operations notwithstanding the absence of an operating budget, but rather point this out merely to indicate that such circumstances exist.

Federal law also may require that additional state agencies or programs continue to operate certain activities. Such requirements could prevail over the state law requirement for an appropriation to pay or incur financial obligations. U.S. Const. art. VI (supremacy clause). Washington's budget and accounting act recognizes this principle, providing that:

If any part of this chapter shall be found to be in conflict with federal requirements which are a prescribed condition to the allocation of federal funds to the state, such conflicting part of this chapter is hereby declared to be inoperative solely to the extent of such conflict and with respect to the agencies directly affected, and such finding or determination shall not affect the operation of the remainder of this chapter in its application to the agencies concerned.

RCW 43.88.220. This statute has the effect of allowing some state agencies to continue to incur financial liabilities to the extent necessary to preclude jeopardizing the receipt of federal funds. RCW 43.88.220.

There are instances in which federal law places an obligation on the state to promptly make payment of public funds by virtue of the state's agreement to participate in a federal program and accept federal funds. To illustrate with a single example, the federal food stamp program requires states to provide benefits for qualified extremely low income households on a timely basis. *See* 7 U.S.C. § 2020; *see also* 7 C.F.R. § 274.2(d). Having chosen to participate in the food stamp program, the state is mandated to comply with federal requirements. *Withrow v. Concannon*, 942 F.2d 1385, 1386 (9th Cir. 1991) (citing *King v. Smith*, 392 U.S. 309, 316 (1968)).

It is, accordingly, clear that at least three categories of state agencies and programs would remain in operation even if the legislature fails to enact a state operating budget by July 1, 2013. These include agencies and programs funded through the transportation budget, agencies and programs funded through unappropriated sources, and agencies and programs the continued operation of which is mandated either constitutionally or by federal law.

The office of the state treasurer does not fall directly into any of those three categories. Moreover, the treasurer's office is funded through a treasury account. RCW 43.08.190 (establishing the treasurer's service fund). Funds from this account are expended only pursuant to legislative appropriation. RCW 43.08.200.

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The continued operation of your office is, however, indispensable to the continued operation of those agencies required to remain in operation. Your office, accordingly, needs to remain operational with the staffing that you reasonably judge necessary to meet these obligations. The duties of your office include, among others, disbursing public funds in the manner provided by law. RCW 43.08.010(2). As you note in posing your question, the treasurer is also responsible for keeping state funds safe and secure, overseeing certain financial operations, and managing state debt. RCW 43.08.010; *see also* RCW 43.08.015 (describing cash management duties). These functions interrelate and intertwine. I understand that, as a practical matter, the continued operation of your office is necessary to the continued operation of other state agencies that are required to continue operating. Stated at its most basic level, without the continued operation of the treasurer's office, those agencies required to continue operating could not pay their employees, vendors, or public clientele.⁴

If constitutional principles or the mandate of federal law require various state agencies to continue providing particular programs or services, such obligations cannot be logically restricted to those agencies that directly provide them. If agencies cannot provide required services without financial services or access to funds that can only be provided by the treasurer's office, then the obligation for those agencies to continue to operate would logically extend to the office of the treasurer. *Cf. Brown v. Vail*, 169 Wn.2d 318, 330, 237 P.3d 263 (2010) (concluding that an agency's authority to perform a function implies authority to utilize the means necessary to accomplish that function). To put the matter a different way, when certain functions are mandated constitutionally or by federal law, it does not matter for purposes of complying with that mandate how the state divides its operations organizationally. Logically, if the state is obligated to pay, for example, food stamp benefits, it does not matter whether the financial transaction is completed by the same agency that administers the program or by a different agency.

I reach this conclusion only in the context in which your question is posed. That is, my conclusion applies in the absence of a state operating budget, with the result that the legislature has not enacted any appropriations for your office at all. The conclusion could well be different if, during a biennium, your office simply spent its entire appropriation before the end of the fiscal period. *See* RCW 43.88.130 (prohibiting agencies from incurring financial obligations "in excess of the amounts appropriated for that purpose"). This suggests a limit to the logic employed in this analysis.

⁴ This opinion addresses only your office, but its logic could extend to other agencies that similarly offer centralized services to the extent that those services are similarly necessary for the operation of agencies that continue to operate during a budget impasse. I mention this not to fully consider the extent to which similar conclusions might apply to other agencies, but merely to note the possibility. Possible examples could include payroll-related functions of the department of enterprise services (RCW 43.19.903), technological infrastructure provided by consolidated technology services (RCW 43.105.052), and investment management by the state investment board (RCW 43.33A.010).

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To the extent the treasurer's services are indispensable to the operation of other state agencies that continue operating in the absence of a state operating budget, the treasurer must provide those services. This is so even though the office of the treasurer is funded through appropriations from the treasurer's service fund.

2. If so, may the obligations incurred by operating the treasurer's office after June 30, 2013, be paid out of a subsequent appropriation?

Your second question contemplates the possibility of a later budget act that retroactively appropriates funds to pay the expenses that your office incurs during a budget impasse. I see no constitutional obstacle to paying those expenses pursuant to a later act that retroactively appropriates funds for that purpose. "Unquestionably, the Legislature has the power to enact a retrospective statute, unless the statute contravenes some constitutional inhibition." *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 302-03, 174 P.3d 1142 (2007) (footnote omitted) (quoting *Lawson v. State*, 107 Wn.2d 444, 454, 730 P.2d 1308 (1986)). An operating budget phrased in terms similar to prior budgets may so provide of its own terms. *See, e.g.*, Laws of 2011, 1st Spec. Sess., ch. 50, § 1 (authorizing expenditures "for the fiscal biennium beginning July 1, 2011, and ending June 30, 2013"). There would seem to be no constraint against the legislature retroactively appropriating funds. *See* AGLO 1978 No. 3, at 2 (concluding that state statutes cannot constrain legislative authority). Of course, such payment could only be made if it is consistent with the terms of the applicable budget act.

The most obvious argument to the contrary might be based upon the constitutional prohibitions against the gift or loan of public funds. Const. art. VIII, §§ 5, 7. But the prohibitions against the gifting or lending of public funds do not apply to gifts and loans to governmental entities whose functions are wholly public. *Rands v. Clarke Cnty.*, 79 Wash. 152, 157, 139 P. 1090 (1914); *see also State ex rel. Washington Toll Bridge Auth. v. Yelle*, 56 Wn.2d 86, 104, 351 P.2d 493 (1960); *Anderson v. O'Brien*, 84 Wn.2d 64, 66, 524 P.2d 390 (1974). For this reason, the prohibitions against gifts and loans of public funds pose no impediment to paying for public functions through a subsequent appropriation.

I trust that the foregoing will be useful to you. This is an informal opinion and will not be published as an Opinion of the Attorney General.

Sincerely,



JEFFREY T. EVEN
Deputy Solicitor General
(360)-586-0728