



STATE OF WASHINGTON

OFFICE OF FINANCIAL MANAGEMENT

*Insurance Building, PO Box 43113 • Olympia, Washington 98504-3113 • (360) 902-0555*

April 25, 2017

**TO:** Directors of Executive Branch agencies  
Presidents of higher education institutions  
Statewide elected officials

**FROM:** David Schumacher  
Director

**SUBJECT: CONTINGENCY PLANNING FOR STATE AGENCY OPERATIONS**

We fully expect the 2017-19 state operating and capital budgets to be enacted in a timely manner. Nevertheless, it is important to update our contingency planning information should any circumstance prevent the Legislature from making appropriations by June 30, 2017.

To that end, we are directing agencies to review and update the information that was provided to the Office of Financial Management (OFM) in 2013 or as updated in 2015. As you will recall, OFM coordinated contingency planning for a partial shutdown of state government in the event that the 2013-15 operating and capital budgets were not enacted by June 30, 2013. OFM also coordinated contingency planning updates with a subset of agencies in preparation for a partial shutdown of state government in the event that the 2015-17 operating and capital budgets were not enacted by June 30, 2015. In both circumstances, agencies were asked to identify services that fell into the categories below. OFM reviewed the agency responses and made the determination of which activities fell into each category.

1. Services funded by appropriations in the enacted transportation budget.
2. Services that do not require an appropriation, such as from non-appropriated funds.
3. Services that must be continued based on certain constitutional mandates and federal law, with the caveat that agencies will consult their assigned assistant attorney general for clarification.
4. Services necessary for the **immediate** response to issues of public safety or to avoid catastrophic loss of state property.

We need agencies to review the information provided in 2013 or 2015, as applicable, and determine if any updates are needed, including deletion of any services that are no longer provided and the addition of any new services, if appropriate. The Legislature has passed the 2017-19 transportation budget, and it is pending the Governor's signature so contingency planning for agencies funded in that budget is limited. If it becomes necessary, we will provide guidance and templates for employee layoff and contractor notifications in mid-May.

Please submit to OFM any changes to the services you previously provided at [ofm.budget@ofm.wa.gov](mailto:ofm.budget@ofm.wa.gov) by Friday, May 5. If you have no changes, send an email stating you have no updates. Descriptions of services should include an estimate of how many staff would be necessary to carry out these operations, including the minimum level of support staff who would be essential for continuing services under categories 3 and 4 above. Attached is an update of the legal briefing we provided in 2015. If you have further legal questions, please consult your assigned assistant attorney general.

Thank you for your assistance. While we consider it unlikely these plans will need to be implemented, it is again prudent to update this information in the event of a worst-case scenario.

## Legal Constraints on Governmental Operations Absent Appropriations

### I. Background of Legal Provisions

The Legislature controls appropriations. Article 8, Section 4 of the State Constitution provides:

***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.***

State law further constrains state officers and employees from incurring obligations against appropriated funds. RCW 43.88.130 states:

***No agency shall expend or contract to expend any money or incur any liability in excess of the amounts appropriated for that purpose.***

RCW 43.88.290 further provides that:

***No state officer or employee shall intentionally or negligently: over-expend or over-encumber any appropriation made by law; fail to properly account for any expenditures by fund, program, or fiscal period; or expend funds contrary to the terms, limits, or conditions of any appropriation made by law.***

The Attorney General's Office opined in 1977 that agencies operating from funds subject to appropriation could not expend such funds or incur liabilities, stating:

***... The basic consequences of a failure by the legislature to have adopted a biennial budget ... is quite simple; namely, no expenditures may be made for salaries or anything else, and no obligations to make such payments may be incurred by any state agency ... including the legislature ... .***

The constitutional and statutory restrictions only apply to funds that require an appropriation.

### II. Constitutional Obligations

The federal and state constitutions establish legal obligations concurrent with the prohibition against expenditures in the absence of appropriations. The Governor intends to keep this very narrow band of legally mandated activities operational in the absence of an operating budget.

a. Care and Custody. When the State takes a person involuntarily into its legal care and custody, the U.S. Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The emphasis of the case law in this area is that the person is involuntarily in the physical custody of the State or the State is the person's legal guardian. Consequently, those persons residing in the state's prisons, state hospitals, juvenile rehabilitation facilities, and the secure commitment center, and children in foster care have a constitutional right to certain services.

The State also has obligations to preserve services to children and to individuals with mental illness or a developmental disability in our care and custody where the State has assumed legal responsibility for their welfare, but reside outside an institution (such as a group home or other facility).

b. Education. Expenditures for K-12 education may also be included in this narrow band of legally required activities. Given the state Supreme Court's continuing jurisdiction in *McCleary v. State*, the failure to appropriate any funds for basic education may call the question of what remedies the Court may entertain to enforce the constitutional obligation.

### III. Federal Mandates

The Supremacy Clause of the U.S. Constitution states that the laws of the United States shall be the supreme law of the land. Consequently, in those instances where federal law places an obligation on the State to promptly make payments of public funds, the federal requirement could prevail over the state appropriation requirement. Agencies need to determine which federal programs under federal law may require the continuation of funding.

To the extent that RCW 43.88.130 and 43.88.290 place the receipt of federal funds in jeopardy, RCW 43.88.220 provides state agencies with authority to continue to incur financial liabilities. However, most federal funds are deposited into the general fund in the state treasury, and thus, are subject to appropriation requirements of Article 8, Section 4. Therefore, in some instances, services paid with federal funds may continue, but payment for those services will be delayed until appropriations are enacted.

### IV. Contracts

Many state agencies have contractual agreements for goods and services that will be impacted if no operating or capital appropriations acts are enacted. It is a standard practice of state agencies to include provisions which state that continuation of contracts are contingent on funding and/or may be reduced to funds appropriated to the agency. Consequently, most agencies can avoid the need to expend funds by exercising such contractual provisions.

Leases are a specific type of contract. Agencies will not be ending leases due to lack of appropriations. Therefore, for agency leases where timely payments may not be made, the agency would be subject to any penalties specified in the lease for late payments.

Agencies should not assume that contracts and agreements with the federal government, vendors, providers, etc. must continue due to an unlawful impairment of contract. More likely is that the lack of funds may place the agency in breach of contract. This is simply a consequence of legislative inaction. We should acknowledge that agencies, and ultimately the taxpayer, may pay a price in the form of interest payments and/or damages.