AMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

January 12, 1990

Honorable John R. McKernan, Jr.
State House Station #1
Augusta, ME 04333

Dear Governor McKernan:

This is in response to your inquiry of January 11 whether Maine law requires you to ensure that the State budget for fiscal year 1991 is in balance prior to the commencement of that year on July 1, 1990. For the reasons which follow, it is the opinion of this Department that you are under no such obligation.

As set forth more fully in the attached Opinion of the Attorney General of March 2, 1983, there are two legal obligations concerning the balancing of the State budget. First, Article IX, Section 14 of the Maine Constitution prohibits the State from incurring any debts or liabilities in excess of $2,000,000, unless bonds to cover any debt or liability in excess of that amount are approved by the Legislature and the people. Second, Section 1664 of the State Budget Act, 5 M.R.S.A. §§ 1661 et seq., requires that the Governor submit a budget for each biennium showing "the balanced relations between the total proposed expenditures and the total anticipated revenues together with the other means of financing the budget for each fiscal year of the ensuing biennium, . . ." Op. Me. Att'y Gen. 83-8.

The second of these requirements is not implicated by your question, since it relates only to the submission of a proposed budget at the outset of each biennium. The first requirement, however, does impose upon the State government the obligation not to overspend (in excess of $2,000,000) actual revenues (and other available funds). Thus, during any one fiscal year, if insufficient funds are on hand to meet new debts or liabilities,

State function on a "cash basis."[1/] See Stein v. Morrison, 75 P. 246 (Ida. 1904). Section 14 of Art. IX of the Maine Constitution provides, in pertinent part:

> The Legislature shall not create any debt or debts, liability or liabilities, on behalf of the State, which shall singly, or in the aggregate, with previous debts and liabilities hereafter incurred at any one time, exceed two million dollars, except to suppress insurrection, to repeal invasion, or for the purposes of war, and except for temporary loans to be paid out of money raised by taxation during the fiscal year in which they are made; and excepting also that whenever two-thirds of both Houses shall it necessary, by proper enactment ratified by a majority of the electors voting thereon at a general or special election, the Legislature may authorize the issuance of bonds on behalf of the State at such times and in such amounts and for such purposes as approved by such action. . . .

Thus, § 14 prohibits the State from incurring long-term debt in the amount of more than $2,000,000, except for certain specified emergencies, without a vote of the people. By requiring the State to function on its revenues and by prohibiting loans except under carefully limited circumstances, the Maine Constitution guarantees that the State's budget will be balanced and precludes deficit financing.

The specific statutory provisions which govern the budgetary process in Maine are consistent with the mandate of Art. IX, § 14, in that they contemplate that a balanced budget will be submitted to the Legislature. 5 M.R.S.A. § 1663, setting out the scope of the budget, provides that,

> The budget of State Government. . . shall set forth all proposed expenditures for the administration, operation and maintenance of the departments and agencies of the State Government; all interest and debt

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1/ It is true that certain states do have both debt limits similar to ours and balanced budget requirements. See, e.g., Colo. Const., Art. X, § 16, and Art. XI, § 3. The language of the balanced budget provisions, however, is similar to the language of our budget statutes. Moreover, where a state is limited in its power to incur debt, that state's budget must ultimately balance in the sense that anticipated expenditures must equal estimated revenues, because, under such limitations, the need for state debt must be anticipated by the legislature.

> redemption charges during each fiscal year and all expenditures for capital projects to be undertaken and executed during each fiscal year of the biennium.

It goes on to require that

> the state budget. . . . set forth the anticipated revenues of the State Government and any other additional means of financing expenditures proposed for each fiscal year of the biennium.

Section 1664 of that Title requires that Part 1 of the budget

> shall embrace a general budget summary setting forth the aggregate figures of the budget in such manner as to show the balanced relations between the total proposed expenditures and the total anticipated revenues together with the other means of financing the budget. . . .

Section 1666 of Title 5 similarly anticipates a budget based on

> estimates. . . of the needs of the various departments and agencies and the total anticipated income of the State Government during the ensuing biennium.

Thus, the specific provisions of the budget statutes strongly support the proposition that Maine is to have a balanced budget.[2/]

Other statutes dealing with the consequences of the budget procedure also suggest a budgetary and appropriation process in which no deficits are to occur. Sections 1511 and 1544 of Title 5 establish procedures dealing with budget surpluses. No such statutes exist for deficits. Section 1668 establishes a method for temporarily curtailing allotments where it "appears. . . that the anticipated income and other available funds of the State will not be sufficient to meet the expenditures authorized by the Legislature."

2/ Indeed, the language of our statutes bears a strong similarity to language found in other states' constitutions which has been characterized by the courts as requiring a balanced budget. See, e.g., Mass. Const., Art. 63, §2; Opinion of the Justices, 376 N.E.2d 1217, 1225 (Mass. 1978). See, n. 1, supra.

The specific constitutional and statutory provisions discussed herein therefore have the practical effect of requiring this State to function on a balanced budget. I hope this information addresses your concern. Please do not hestitate to call on us if this office can be of further service.

Sincerely,

JAMES E. TIERNEY
Attorney General

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RICHARD S. COHEN
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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

March 19, 1980

Honorable Jerome A. Emerson
Maine Senate
State House
Augusta, Maine 04333

Dear Senator Emerson:

You have asked whether under 5 M.R.S.A. § 1668 the Governor may, when there is a shortfall in revenues, "curtail allotments" to the State Aid Construction Fund which have been made pursuant to appropriations by prior Legislatures. While the answer is by no means free from doubt, we do not believe that the Governor has this authority.

The general power of the Governor to curtail allotments from legislative allocations because of a shortfall in revenues is set out in 5 M.R.S.A. § 1668. That section provides:

> "Whenever it appears to the Commissioner of Finance and Administration that the anticipated income and other available funds of the State will not be sufficient to meet the expenditures authorized by the Legislature, he shall so report in writing to the Governor, and shall send a copy of the report to the President of the Senate and the Speaker of the House and the majority and minority leaders of the Senate and House. After receiving the report, the Governor may temporarily curtail allotments equitably so that expenditures will

no such obligations (in excess of $2,000,000) can be incurred. Article IX, Section 14 of the Maine Constitution, however, does not require you to take any particular step in advance of the actual event of such a shortfall. As we understand it, no shortfall is projected for fiscal 1990 in any case.

With respect to your question about how you may act to assure that the budget remains in balance, the answer depends on the circumstances. First, and most obvious, you and the Legislature may enact an amended budget for the biennium to take into account projected reductions in revenues. Second, if it appears that revenues will be insufficient to meet budgeted expenses, you may "temporarily curtail" allotments following the procedures set forth in 5 M.R.S.A. § 1668. As the attached opinion reflects, that section requires an explanation of the impact of such curtailments so that the Legislature may amend the budget should it choose to do so in response to your action. Op. Me. Att'y Gen. 80-65.

This leads to your final question about FY 1991. Should the Legislature adjourn without enacting an amended balanced budget, you could exercise your allotment curtailment powers in fiscal 1991 to assure a balanced budget for that year. That power is, as the attached opinion by Attorney General Cohen makes clear, restricted to temporary curtailments of allotments, on an emergency basis.

I hope the foregoing answers your questions. Please feel free to reinquire if further clarification is necessary.

Sincerely,

James T. Kilbreth

JAMES T. KILBRETH
Chief Deputy Attorney General

JTK:sw

JAMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

March 2, 1983

Honorable John Diamond
House of Representatives
State House Station #2
Augusta, Maine 04330

Dear Representative Diamond:

You have requested an opinion from this office on the question of whether the state budget is required to be balanced under current constitutional and statutory provisions, or whether an amendment to the Maine Constitution is necessary to achieve that purpose. This office concludes that the current constitutional and statutory structure contemplates that the state budget be balanced.

It is important at the outset to define the term "balanced budget." It will be assumed, for purposes of this opinion, that a balanced budget is one in which "proposed expenditures [do] not exceed estimated available funds." People ex rel. Ogilvie v. Lewis, 274 N.E.2d 87, 88 (Ill. 1971). A review of our relevant constitutional and statutory provisions indicates that they contemplate a budgetary and appropriation process in which no deficits occur.

Maine's constitutional limitation on the incurrence of debt by the State has the effect of ensuring that the

> not exceed the anticipated income and other available funds. No allotment shall be terminated pursuant to this section. Any curtailment of allotments shall, insofar as practicable, be made consistent with the intent of the Legislature in authorizing these expenditures.
>
> "The Governor shall immediately upon the curtailment of any allotment, notify the President of the Senate and the Speaker of the House and the majority and minority leaders of the Senate and House of the specific allotments curtailed, the extent of curtailments of each allotment and the effect of such curtailment on the objects and purposes of the program so affected."

Section 1668 was enacted in 1976 as part of comprehensive legislation redistributing the powers of the abolished Executive Council. P.L. 1975, c. 771, § 77-A (1976). It was not included, however, in the original bill redistributing such powers, but rather was added by amendment on the floor of the Senate. 1976 Maine Legislatire Record, p. 971-72 (1976). The Statement of Fact to the amendment stated that:

> "The purpose of the amendment is to put into the statutes a provision that has been in each appropriations bill for many years.1/ The provisions allowed

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1/ An example is the last such provision to be enacted, which appeared in the so-called special appropriation bill for the fiscal year 1976-77. P. & S.L. 1975, c. 147, § 3 (1976). The section provided:

> "Sec. 3. Temporary curtailment of allotments.
>
> Whenever it appears to the Commissioner of Finance and Administration that the anticipated income and other available funds of the State will not be sufficient to meet the expenditures authorized by the Legislature, he shall so report to the Governor and Council and they may temporarily curtail allotments equitably so that expenditures will not exceed the anticipated income and other available funds."

> the Governor and the Executive Council to curtail allotments, temporarily and equitably, after notice of an anticipated revenue deficit from the Commissioner of Finance and Administration." Statement of Fact to Senate Document No. S-526, 107th Legislature (1976).

The purpose of the amendment was further explained by its sponsor, Senator Merrill, at the time of its introduction on the Senate floor:

> "What this amendment requires is that [the curtailment] be done equitably, which is the traditional language in appropriations bills, and it requires that it be done in such a way as to be consistent, so far as possible and practical, with the intent of the Legislature in passing the appropriations bill.
>
> "The thing that is really somewhat new, and I think is a very minor step, is that it provides that once the Governor has made this curtailment he will notify the President of the Senate and the Speaker of the House[2/] of the cuts that he had made, in essence so to give those people an impact statement of what the impact of his actions will be. The obvious remedy, if this is grossly unacceptable to the President and to the Speaker and to the constituents that they represent, namely, the members of the Legislature, that the Legislature can call itself into session or, if it is in session, take some action to change this result." 1976 Maine Legislative Record, p. 971-72 (1976).

The purpose of Section 1668 is therefore clear. It was intended to codify the long-standing practice in biennial appropriations bills of giving the Governor the authority to make emergency curtailments of allotments authorized by those bills. The narrow question which your inquiry raises is whether

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2/ The bill was subsequently amended to include the Majority and Minority Leaders of each House. 1976 Maine Legislative Record, p. 972 (1976).

the Governor may make such curtailments with regard to past allotments from the State Aid Construction Fund. Any response to this question, therefore, requires an understanding, not only of the legislative history of Section 1668 just set forth, but also of the precise operation of the State Aid Construction Fund.

The State Aid Construction Fund was created in 1913, P.L. 1913, c. 130, §§ 19-25 (1913), now codified as amended at 23 M.R.S.A. §§ 1101-1109. From the beginning the Fund was characterized as a "joint fund,"23 M.R.S.A. § 1102, into which the municipalities of the State would be able to contribute money which they had appropriated for specific highway purposes and into which the State would contribute matching funds, generally on an equal basis. Until 1931, the State contributions to the Fund were made from its general revenues. In that year, however, the Legislature established the General Highway Fund and began funding the State Aid Construction Fund from it, providing that all "unexpended balances of the General Highway Fund as have been set up for general construction and maintenance of highways and bridges shall be deemed nonlapsing carrying accounts." P.L. 1931, c. 251, § 4 (1931), now codified at 23 M.R.S.A. § 1652. Thus, State contributions to the State Aid Construction Fund were to be made from the General Highway Fund but were not to lapse if not actually spent in the period for which they were appropriated. Rather, they would remain in the "joint fund" for future use as needed.

The process, as we understand it, by which the Department of Transportation makes money available to the municipalities from the State Aid Construction Fund, under this statutory scheme, is as follows: After the Legislature has made a biennial appropriation for the State Aid Construction Fund from the General Highway Fund, the Department commits a portion of that appropriation for each municipality which notifies the Department that it has made a like appropriation for highway purposes, and continues to set aside such funds until the entire fiscal year's appropriation has been committed. The State Controller then carries the State appropriated funds on his books until notified by the Department that a municipality for which it has committed funds in the past is ready to begin construction on an approved project. The Controller then pays the municipality the committed funds. Since, however, a municipality may not be ready to begin construction for many years after it first makes an appropriation and State funds are committed, the State Aid Construction Fund had built up a balance of over $12,000,000 at the beginning of the 1979-1981 biennium. All of this money, however, the Department advises us, is committed to match specific municipal appropriations.

Having recited the relevant legal and factual background, the question becomes whether 5 M.R.S.A. § 1668 applies to money in the State Aid Construction Fund appropriated and matched with municipal contributions in prior biennia. While, as indicated above, the answer is not entirely free from doubt, it is our view that the Governor's power to curtail allotments does not extend to the funds under consideration.

Critical to our conclusion are two aspects of the State Highway Law. First, the Legislature has provided that the aggregate of the money appropriated by the towns and the matching funds apportioned by the Department "shall constitute a joint fund for the construction and improvement of the state or state aid highways in such towns." 23 M.R.S.A. § 1102. Second, the Legislature has further provided that once established, this joint fund shall constitute a nonlapsing carrying account. 23 M.R.S.A. § 1652. When read together, these statutes reveal a clear legislative intent to establish an ongoing "special fund" to be used for the construction and improvement of state or state aid highways and not for any other purpose.

It is a general principle of law that money in a special fund must be expended for the purpose recited in the statute creating the fund.

> "Where a special fund is created or set aside by statute for a particular purpose or use, it must be administered and expended in accordance with the statute, and must be applied only to the purpose for which it was created or set aside, and not diverted to any other purpose, or transferred to any other fund." 81A C.J.S. States § 228 (1977).

In our view, a construction of 5 M.R.S.A. § 1668 which would allow the Governor to reduce the amount of money appropriated and placed in the State Aid Construction Fund in prior biennia, would violate the above principle, in that it would constitute a diversion of the funds to other purposes.[3/] Similarly, it

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3/ We should emphasize that we are dealing only with money appropriated by prior Legislatures and already placed in the "joint fund" in accordance with the applicable sections of the Highway Law.

would defeat what we perceive as the intent behind the non-lapsing provision, namely, that State Aid money unexpended at the end of the biennium be maintained in the Fund and utilized for its original purpose.

We recognize that 5 M.R.S.A. § 1668 could be read as overriding the relevant sections of the Highway Law and thus authorizing the Governor to reduce the amount of money placed in the Fund pursuant to appropriations by prior Legislatures. That reading does not, however, appear compatible with the language of § 1668 which was designed to allow the Governor to deal with shortfalls in "anticipated income and other available funds." Since the Legislature has limited the "availability" of money previously placed in the State Aid Construction Fund, we think it more reasonable to conclude that § 1668 does not extend to that money. Furthermore, in attempting to reconcile potentially conflicting statutes, every attempt must be made to effectuate the intent behind those laws. We believe that the interpretation rendered herein accomplishes that objective, insofar as it construes the Governor's power to curtail allotments in a manner which preserves the legislative intent that certain areas of highway construction and improvement be financed through a special, nonlapsing fund.

To summarize, it is our view that 5 M.R.S.A. § 1668 does not authorize the Governor to reduce the amount of money placed in the State Aid Construction Fund pursuant to appropriations in prior biennia.4/

Please let me know if we can be of any further service.

Sincerely,

RICHARD S. COHEN
Attorney General

RSC/ec

4/ In light of the question posed, our opinion is limited to an interpretation of 5 M.R.S.A. § 1668. We do not address the extent of the Governor's power, under 23 M.R.S.A. § 1652, to approve temporary transfers from one account of the General Highway Fund to another account thereof.