



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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September 12, 2017

Hon. Matthew G. Bevin
Governor
Commonwealth of Kentucky
700 Capital Avenue, Suite 100
Frankfort, KY 40601

Mr. John E. Chilton
State Budget Director
Capitol Annex, Room 284
702 Capitol Avenue
Frankfort, KY 40601

Sent via Hand Delivery

Dear Governor Bevin and Director Chilton:

It is my hope that you read this letter for what it is – a statement of Kentucky law. It is not my opinion, my fiscal policy, or any attempt to attack you. We all must follow the law.

On Friday, I received the attached letter wherein Director Chilton advises that the Consensus Forecasting Group has estimated a \$200 million budget shortfall for FY2018. Reports from the Associated Press have suggested that the \$200 million is a “planning estimate” that is neither official nor final. On top of this shortfall, Governor Bevin wishes to add \$150 million to the state’s Rainy Day Fund.

Director Chilton’s letter states that you seek to both (a) address the unofficial shortfall and (b) to add the \$150 million to the Rainy Day Fund through one means: budget reductions. These reductions amount to of 17.4% of the total General Fund dollars appropriated to what you term as “non-exempt” agencies.

The Attorney General’s Office is always willing to do its part to help Kentuckians. However, it has an obligation to enforce the law and to ensure, regardless of whether actions are taken with good or bad intentions, that our state government does not violate the law. *See Beshear v. Bevin*, 498 S.W.3d 355 (2016) (Because the Attorney General is the chief law officer of the Commonwealth, he is uniquely suited to challenge the legality and constitutionality of an executive or legislative action as a check on an allegedly unauthorized exercise of power.)

As you are aware, the General Assembly has passed mandatory and restrictive laws that provide when and how budget reductions can be made. These laws also put strict limitations on how budget reduction dollars may be used.

HON. MATTHEW G. BEVIN
MR. JOHN E. CHILTON
September 12, 2017

Under KRS Chapter 48, the General Assembly has clearly stated that “no budget reduction action shall be taken” until and unless there is either (1) an actual or (2) a projected revenue shortfall. *See* KRS 48.130, KRS 48.600. Both of these terms are defined by Kentucky law.

An actual revenue shortfall cannot occur, and thus budget reductions for an actual shortfall cannot be authorized, until the end of a fiscal year. An actual revenue shortfall occurs when receipts for the general or road fund are less than the enacted estimates when the fiscal year closes. *See* KRS 48.010(18)(a).

To qualify as a “projected revenue shortfall” – and therefore allow budget reductions – there must be an “official revenue estimate” from the Consensus Forecasting Group. KRS 48.010(18)(b). In other words, the Group must provide an official, finalized forecast.

If the Associated Press is correct, the Consensus Forecasting Group’s prediction of the \$200 million shortfall will not be official or final until December. If that is accurate, KRS Chapter 48 does not allow – and indeed prohibits – any budget reductions before that time. While I understand the Governor’s comments that the state “can’t wait until then to begin belt tightening,” the General Assembly has passed laws saying budget reductions are unlawful before the official projection.

State law also imposes strict limits on the exact amount of budget reductions that can be enacted and where the money must go. In at least two separately enacted statutes, the General Assembly mandated that budget reductions cannot exceed the official estimate of a projected shortfall, and cannot be used for other purposes. Under KRS 48.600, it stated: “**No budget reduction action shall be taken** ... in excess of the actual or projected budget shortfall.” To remove any doubt, under KRS 48.130(6), the General Assembly made the mandate a second time, repeating: “**No budget reduction action shall be taken** ... in excess of the actual or projected budget shortfall.” To alleviate any doubt, last year the Kentucky Supreme Court echoed these mandates, and stated for a third time that budget reductions cannot exceed the projected shortfall. *See Beshear v. Bevin*, 498 S.W.3d at 374.

Under state law, the Governor, General Assembly, and the Chief Justice therefore cannot make or accept budget reductions in excess of the official estimate of the projected shortfall. As stated earlier, there does not yet appear to be an official estimate. If the \$200 million projection becomes final, that number is the maximum amount allowable for any budget reductions.

The Governor’s desire to create \$150 million for the Rainy Day Fund through budget reductions is therefore prohibited by law. Such an attempt would create budget reductions “in excess” of the actual or projected shortfall, and would therefore violate the strict mandates and prohibitions of KRS 48.600 and 48.130.¹ Again, while I can understand the concerns as to the

¹ This prohibition should not be surprising, as the Governor admitted in his Appellee Brief in *Beshear v. Bevin* that he could not, under state law, use budget reductions to redirect funds to the Rainy Day Fund. *See Appellee Br.* at 31-32n.30.

HON. MATTHEW G. BEVIN
MR. JOHN E. CHILTON
September 12, 2017

state's bond rating and the importance of the Rainy Day Fund, the law is the law, and the General Assembly has spoken.

State laws governing the Rainy Day Fund further prohibit its acceptance of budget reduction funds. KRS 48.705 states how the Rainy Day Fund "*shall*" be funded. It states the Fund "*shall*" receive its dollars through "direct appropriations," *i.e.* what the General Assembly provides in the Budget, or from any surplus at the close of a fiscal year. KRS 48.705(1)-(2). Budget reduction dollars do not fall within either of these sources.

To summarize, under Kentucky law, budget reductions must wait until the Consensus Forecasting Group has finalized its projection. Once that projection is final, the projected shortfall will be the maximum amount of budget cuts allowed under law. While these prohibitions are restrictive, they are the law.

Given that you will need to revise your current plan, it is important that I raise some additional points and ask for some clarification. As you are aware, a Governor does not have the power to make budget reductions outside of the Budget Reduction Plan passed by the General Assembly. *Beshear v. Haydon Bridge I*, 304 S.W.3d 682, 686 (Ky. 2010). Director Chilton's letter does not detail any steps that he intends to take pursuant to the Budget Reduction Plan. Indeed, it does not suggest the Plan is being followed at all. I would suggest that in a future letter, you outline the specific steps that are being taken before agency cuts.

Connected to this point, I would advise you to follow the full Budget Reduction Plan passed by the General Assembly. While the Governor attempted to line item many of its provisions, case law from other jurisdictions and Kentucky's constitutional law both suggest the Governor exceeded his authority in such line items.

Finally, I would advise that Director Chilton's letter raised many questions for both my Office and other agencies. My hope is any future communication will embrace transparency and provide answers to the following questions:

1. The letter seeks reductions to "non-exempt" agencies. What agencies are exempt, and under what rationale?
2. Some agencies are revenue-producing units, meaning cuts to that agency would result in fewer dollars to the General Fund. Since January 2016, the Attorney General's Office has provided over \$37.5 million for either direct appropriation by the General Assembly or that has been returned to the General Fund. Are you considering the fact that some agencies produce revenue, and what credit are you applying to those agencies generating funds?
3. 72 % of General Fund dollars appropriated to the Attorney General's Office support the Office's efforts to fight violent crime. The Branches funded with these dollars include Criminal Appeals, Special Prosecutions, DCI, and Victims Advocacy, all of which focus on arresting and prosecuting dangerous child molesters, murderers, and drug dealers. Likewise, the Commonwealth's and County Attorney's budget – which face nearly \$16

HON. MATTHEW G. BEVIN
MR. JOHN E. CHILTON
September 12, 2017

million in cuts – are used to fight crime. Your requested cuts will damage these Branches and unquestionably impact public safety. Should the Attorney General's Office or any other agency with these concerns agree to a reduction, would the Office of State Budget Director provide a corresponding and equal increase to the agency's Restricted Fund spending authority to provide the agency with an opportunity to offset the damage and potentially support public safety through those restricted fund dollars?

Again, this letter is a statement of Kentucky law, not my opinion, my fiscal policy, or any attempt to attack you. I therefore hope you will look at this law and provide affected agencies with a follow up letter that follows KRS Chapter 48. Given Director Chilton's request for a reduction plan on September 25, I request that a follow-up letter be sent to impacted agencies by September 15.

Sincerely,

A handwritten signature in black ink, appearing to read "Andy Beshear". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Andy Beshear
Attorney General

Enclosure

Cc: Hon. Robert Stivers II, Senate President
Hon. Jeff Hoover, Speaker of the of House of Representatives
Hon. Laurie K. Dudgeon, Director, Administrative Office of the Courts