

March 15, 2017 Advisory Letter – Opinion Request – Transfers from the Enhanced 911 Fund

Hon. Cathrynn N. Brown
N.M. State Representative, Dist. 55
1814 North Guadalupe
Carlsbad, New Mexico 88220

Re: Opinion Request – Transfers from the Enhanced 911 Fund

Dear Representative Brown:

This Office has completed its review of the question raised in your January 25, 2017 request for an Attorney General opinion as to whether the legislature may legally transfer funds (or “sweep”) non-reverting Enhanced 911 Fund to the general fund to address the state’s current budgetary problems. The short answer is yes.

Constitutional authority of the legislature

New Mexico’s State Constitution describes three branches of government—the legislative, executive and judicial. N.M. Const. Art III, § 1. Of those, the legislature is the only branch authorized to appropriate funds, N.M. Const. Art IV, §30 (stating that “[e]xcept interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature”), and the legislature’s duties cannot be delegated to any other branch. *State ex rel. Schwartz v. Johnson*, 1995-NMSC-080, ¶ 3, 120 N.M. 820, 907 P.2d. 1001.

The Constitution instructs the legislature on how to make a proper appropriation, see Art. IV, § 16, (stating in pertinent part that “[g]eneral appropriations bills shall embrace nothing but appropriations for the expense of the executive, legislative and judiciary departments, interest, sinking fund, payments on the public debt, public schools and other expenses required by existing laws.... All other appropriations shall be made by separate bills”). It does not, however, specify what procedures must be taken in order for the legislature to transfer funds.

New Mexico courts have recognized that the legislature is the only branch of government authorized to enact legislation, including appropriations bills, *Atkinson v. Maloney*, 1969-NMSC-139, ¶13, 80 N.M. 720 (stating that N.M. Const. Art. IV, § 30 “prohibits expenditure of money unless appropriated by the legislature”), even though the governor retains the negative power to exercise a line item veto of the budget. *Sego v. Kirkpatrick*, 1974-NMSC-059, ¶12, 86 N.M. 359. Reviewing courts require only that a legislative enactment lie within the limits set by the Constitution, and the courts presume the validity and regularity of legislative acts and procedures. See *Dickson v. Saiz*, 1957-NMSC-010, ¶ 16, 62 N.M. 227, 308 P. 2d 205 (stating that a court “should be well satisfied of the invalidity of an act upon constitutional grounds before striking it down” and “if two constructions each equally reasonable should exist, the one sustaining the

validity of the act is to be preferred”). The courts remain “respectful of constitutional separation of powers and accordingly prefer to allow the legislative process to play out free from judicial interference, so long as the process is open and transparent.” *State ex rel. Cisneros v. Martinez*, 2015-NMSC-001, ¶ 42 , 340 P.3d 597.

Statutory limits on the legislature’s authority

Section 6-4-6 (1991) authorizes the legislature to use the general fund to pay “current expenses and obligations of state government regardless of the specific fund or account to which the accounting records of the state government may show those funds or accounts allocated or appropriated”, so long as the funds are not from the following sources: revenues deposited for credit to any permanent fund; revenues deposited and pledged for the payment of principal and interest on any state indebtedness; federal revenues deposited for payment for a specific program; or income from the permanent fund. §6-4-6 (B) (1991). The legislature has imposed statutory limits on itself, defining the general fund to include only revenues “not otherwise allocated by law.” NMSA 1978, §. 6-4-2 (2016). In theory, it is possible that the authorizing statute for the E-911 fund, § 63-9D-1 through 63-9D-11.1 (1998), could be considered as “otherwise” allocating the fund, as its states:

Money deposited in the fund and income earned by investment of the fund are appropriated for expenditure in accordance with the Enhanced 911 Act and shall not revert to the general fund.

Because the E-911 fund does not represent revenue credited to the permanent fund, deposited and pledged for payment of principal and interest on state indebtedness, federal revenue or income from the permanent fund, it is reasonable to conclude that the fund may be used by the legislature to pay current expenses and obligations of state government.

Conclusion

The State Constitution authorizes the legislature to “sweep” the E-911 fund as it creates and passes an appropriations bill. Further, state law supports the legislature’s ability to sweep even a non-reverting fund, so long as the fund does not fit into any of the four “exceptions” to the legislature’s ability to transfer funds in order to pay current expenses and obligations of State government.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General’s opinion on the matters discussed above. Such an opinion would be a public document, available to the general public. Although we are providing our legal advice in the form of a letter rather than an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public.

Sincerely,

Jennie Lusk
Assistant Attorney General