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The Honorable Jim Kastama
State Senator, District 25
PO Box 40425
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The Honorable Mark Miloscia
State Representative, District 30
PO Box 40600
Olympia, WA 98504-0425

Dear Senator Kastama and Representative Miloscia:

By letter previously acknowledged, you have requested an opinion on the following paraphrased questions:

- 1. Does a determination by the Director of the Office of Financial Management that due to a lack of available funds, state agencies are not required to perform an independent assessment of their quality management system contradict RCW 43.17.385?**
- 2. Does an agency director have the authority to interpret a requirement set forth in statute to be completed within available funds as discretionary, rather than mandatory?**

BRIEF ANSWER

RCW 43.17.385 requires each state agency to develop and implement a quality management program “within available funds.” This includes a provision calling for an independent assessment of each agency’s quality management system. RCW 43.17.390. The legislature’s inclusion of the phrase “within available funds” in RCW 43.17.385 adds a condition to language that would, in its absence, simply direct state agencies to take action. As a result, an agency is directed to contract for independent assessments of its quality management system only if it determines that funds are “available” for that purpose.

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ANALYSIS

Both of your questions relate to RCW 43.17.385. That statute provides:

(1) Each state agency shall, *within available funds*, develop and implement a quality management, accountability, and performance system to improve the public services it provides.

(2) Each agency shall ensure that managers and staff at all levels, including those who directly deliver services, are engaged in the system and shall provide managers and staff with the training necessary for successful implementation.

(3) Each agency shall, *within available funds*, ensure that its quality management, accountability, and performance system:

(a) Uses strategic business planning to establish goals, objectives, and activities consistent with the priorities of government, as provided in statute;

(b) Engages stakeholders and customers in establishing service requirements and improving service delivery systems;

(c) Includes clear, relevant, and easy-to-understand measures for each activity;

(d) Gathers, monitors, and analyzes activity data;

(e) Uses the data to evaluate the effectiveness of programs to manage process performance, improve efficiency, and reduce costs;

(f) Establishes performance goals and expectations for employees that reflect the organization's objectives; and provides for regular assessments of employee performance;

(g) Uses activity measures to report progress toward agency objectives to the agency director at least quarterly;

(h) Where performance is not meeting intended objectives, holds regular problem-solving sessions to develop and implement a plan for addressing gaps; and

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(i) Allocates resources based on strategies to improve performance.

(4) Each agency shall conduct a yearly assessment of its quality management, accountability, and performance system.

(5) State agencies whose chief executives are appointed by the governor shall report to the governor on agency performance at least quarterly. The reports shall be included on the agencies', the governor's, and the office of financial management's web sites.

(6) The governor shall report annually to citizens on the performance of state agency programs. The governor's report shall include:

(a) Progress made toward the priorities of government as a result of agency activities; and

(b) Improvements in agency quality management systems, fiscal efficiency, process efficiency, asset management, personnel management, statutory and regulatory compliance, and management of technology systems.

(7) Each state agency shall integrate efforts made under this section with other management, accountability, and performance systems undertaken under executive order or other authority.

RCW 43.17.385 (emphasis added). The section that follows it in the code requires "[s]tarting in 2012, and at least once every three years thereafter, each agency shall apply to the Washington state quality award, or similar organization, for an independent assessment of its quality management, accountability, and performance system." RCW 43.17.390.

Your questions therefore concern the meaning of the phrase "within available funds" in RCW 43.17.385.¹ The primary objective of a court in construing a statute is "to discern and implement the intent of the legislature." *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011). "The surest indication of the legislature's intent is the plain meaning of the statute, which we glean 'from all that the Legislature has said in the statute and related

¹ Your request for this opinion does not ask us to independently evaluate the question of whether funds are "available" as a matter of fact. Your request is appropriately limited in this regard, because our opinions serve to provide legal analysis of issues of law and are not well-suited for resolving factual questions. Accordingly, nothing in this opinion should be construed as rendering any view as to the facts underlying the memorandum you ask about.

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statutes which disclose legislative intent about the provision in question.” *Id.* (quoting *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)). If the plain language of the statute is unambiguous, courts afford the statute its plain meaning. *Tesoro Refining & Mktg. Co. v. State*, 173 Wn.2d 551, 556, 269 P.3d 1013 (2012). If the statute is “susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant case law for assistance in determining legislative intent.” *Anthis v. Copland*, 173 Wn.2d 752, 756, 270 P.3d 574 (2012) (quoting *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)).

The construction to be given to a specific phrase depends in large part upon the statutory context in which it appears. *Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007) (quoting *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (quoting *State v. Huntzinger*, 92 Wn.2d 128, 133, 594 P.2d 917 (1979)) (“The meaning of words in a statute is not gleaned from those words alone but from ‘all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.’”). Factors that can affect the meaning of statutory language include not only the choice of words used, but the context in which those words appear. *Id.* The underlying legislative purpose of the act can also influence the construction of particular words. *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004) (looking to the “underlying legislative purpose”). Additional guidance as to the meaning of a term could also arise from an enacted statement of legislative purpose or intent included within legislation, or the inclusion of a definition section within legislation. *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010) (reliance upon a statement of legislative purpose); *United States v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 999 (2005) (“It is an axiom of statutory interpretation that where a term is defined we will use that definition.”).

The role of context in statutory construction is particularly important with regard to your questions, because the term “within available funds”—as well as others similar to it—appear in numerous statutes in many titles of the RCW. The phrase “within available funds” appears in dozens of statutes. In addition, more than a dozen more statutes use arguably related phrases, such as “subject to the availability of funds appropriated for this purpose” (*see, e.g.*, RCW 2.56.210), “subject to available funds” (*see, e.g.*, RCW 13.40.080), “to the extent funds are available” (*see, e.g.*, RCW 28A.300.105), and “to the extent practicable within available funds” (*see, e.g.*, RCW 43.215.500). This opinion addresses merely the use of the term “within available funds” in the specific context of RCW 43.17.385. The term may or may not carry the same significance in the context of other statutes.²

² It can be tempting to compare and contrast the use of the same or similar phrases in different statutes in order to suggest that the term either has a single consistent meaning, or that specific differences in phrasing or context suggest different meanings. But when the statutes being compared address different subjects and were enacted at different times, such an argument would assume a degree of consistency that is not reasonable to expect

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Applying these principles of statutory construction to RCW 43.17.385, the threshold question is whether RCW 43.17.385 is ambiguous—that is, whether it is “susceptible to more than one reasonable interpretation.” *Anthis*, 173 Wn.2d at 756. The statute provides, “Each state agency shall, *within available funds*, develop and implement a quality management, accountability, and performance system to improve the public services it provides.” RCW 43.17.385(1) (emphasis added). Two paragraphs later, it describes such a quality management system more specifically, stating “[e]ach agency shall, *within available funds*,” ensure that its quality management system satisfies a list of requirements. RCW 43.17.385(3). There are several potential reasonable meanings for the phrase “within available funds” as used in the statute. First, a court might read the statute to mean that each state agency must develop and implement a quality management system with whatever funds are explicitly appropriated for that purpose. Second, a court might read the statute as requiring each state agency to develop and implement a quality management system within the funding it currently receives or within maintenance budget amounts. Third, a court could construe the statute to mean that each state agency must develop and implement a quality management system only if funds are available for doing so, taking into account other statutory functions of the agency.

The first of the three potential methods of reading RCW 43.17.385 is the easiest to exclude. It could be argued that RCW 43.17.385 means that each state agency must develop and implement a quality management system with whatever funds are identified in the operating budget as being appropriated for that purpose. This reading, however, is not consistent with the language the legislature used. As noted, the statute merely requires that agencies perform the function, “within available funds,” without suggesting that funds would only be “available” if specifically appropriated for the specific purpose. Courts avoid construing statutes in a way that requires words to be read into a statute that the legislature did not choose to include. *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Funds can certainly be “available” for use for a statutorily-authorized function without necessarily being called out with specificity in the operating budget. See *Webster’s Third New International Dictionary* 150 (2002) (defining “available” to mean, *inter alia*, “such as may be availed of”). If the legislature’s intention had been to limit the directive based upon the appropriation of funds for the specific task, it could have said so directly. See Office of the Code Reviser, Statute Law Committee, *Bill Drafting Guide 2011*, pt. III(2)(b)(iii) (recommending the phrase “subject to the availability of amounts appropriated for this specific purpose” in lieu of “subject to available

of multiple legislative drafters over time and across subject areas. See *Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007) (applying the maxim that a difference in phrasing indicates a difference in meaning only “in the same statute”).

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funds” because the latter phrase “leaves it unclear what should happen if the agency has funds ‘available’ but not appropriated for this particular purpose”).³

The second possible reading of RCW 43.17.385 would be to construe the phrase “within available funds” to direct agencies to absorb the cost of operating their quality management programs within their existing appropriations. The problem with this interpretation is that it would render the phrase “within available funds” unnecessary. State agencies are already constitutionally and statutorily required to ensure that all expenditures are consistent with the terms of the applicable appropriation. Const. art. VIII, § 4 (agencies may spend money only pursuant to appropriation); RCW 43.88.130 (prohibiting expenditures in excess of appropriation). If the phrase had simply been omitted, RCW 43.17.385(1) would read: “Each state agency shall develop and implement a quality management, accountability, and performance system to improve the public services it provides.” Since agencies already have an obligation to expend funds only according to appropriation, under this construction the phrase “within available funds” would be unnecessary. “The legislature is presumed not to include unnecessary language when it enacts legislation.” *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004).

The presumption against the inclusion of unnecessary language, however, does not always apply. Sometimes unnecessary language might be included in a provision simply to preclude a misunderstanding of other language. *See State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 982 P.2d 611 (1999) (explaining that the purpose of a provision in a constitutional amendment was to prevent other language in the same amendment from being misunderstood). In other words, the legislature might have included the phrase “within available funds” simply to stress that the legislature did not intend to provide additional funds to agencies, and to direct them to implement their quality management systems as part of the cost of conducting the programs and functions statutorily assigned to the agency. In a different statutory context, it might make sense to read the phrase this way. *See, e.g.*, RCW 43.70.610 (requiring an agency to “establish, within available department general funds,” a particular program). In this context, however, it fails to explain the legislature’s choice of words. The phrase “within available funds,” in the specific context of RCW 43.17.385, does not convey information concerning the source of funding, but rather adds limiting language to a phrase that would otherwise expressly direct agencies to pursue a specific action.

³ The Bill Drafting Guide is available on the Code Reviser’s Web site at: http://www.leg.wa.gov/CodeReviser/Pages/bill_drafting_guide.aspx (last visited July 9, 2012). The discussion in the Bill Drafting Guide concerns the use of phrases similar to “within available funds” for the purpose of limiting state liability. For example, if the legislature requires that an agency provide a specific service to the public, it may also desire to include language that limits the state’s obligation based on available funds. *See, e.g., Washington Ass’n of Child Care Agencies v. Thompson*, 34 Wn. App. 235, 251, 660 P.2d 1129 (1983) (declining to order DSHS to provide funding for a program at a higher level than the legislature had appropriated, based upon a statute that mandated services only “insofar as they are available”).

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The intent section of the legislation originally enacting RCW 43.17.385 might suggest that the phrase “within available funds” should simply be ignored as “surplusage.” See *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 859, 774 P.2d 1199 (1989) (citing 2A N. Singer, *Statutory Construction* § 47.37 (4th ed. 1984) (“surplusage in a statute may be ignored in order to subserve legislative intent”). The legislature found that “[c]itizens demand and deserve accountability of public programs and activities. Public programs must continuously improve accountability and performance reporting in order to increase public trust.” Laws of 2005, ch. 384, § 1 (uncodified but printed as a note following RCW 43.17.380). It would arguably be anomalous for the legislature to stress the importance it attached to quality management systems, but then to allow agencies the discretion to assign it a lower priority through an assessment of “available funds.” It might therefore be argued that the phrase “within available funds” should be construed not to authorize such discretion, even if that results in the language being unnecessary. To so conclude, however, would be to place undo stress on intent language that doesn’t express such a result. Statements of legislative purpose, however helpful they may be in construing ambiguous language, do not state operative rules or create legal obligations. *Sane Transit v. Sound Transit*, 151 Wn.2d 60, 76, 85 P.3d 346 (2004). Accordingly, the intent section of the 2005 act does not convincingly suggest that the phrase “within available funds” should be disregarded.

This leaves the third possible construction of the statute as the best way of assigning meaning to the phrase “within available funds.” A court would likely construe RCW 43.17.385 to mean that each state agency must develop and implement a quality management system only if funds are available for doing so, taking into account other statutory functions of the agency. It seems clear that if RCW 43.17.385 had provided that agencies “shall develop and implement a quality management system,” without qualification, the directive would mean exactly that. The agency would be required to perform the function in question without limitation or qualification. Thus, adding the language “within available funds,” must condition or limit that directive.

The statute addresses state agencies globally, referring to “each state agency.” RCW 43.17.385(1). Each agency is subject to various statutes requiring or authorizing it to perform various functions that constitute the agency’s public services. Agencies are, of course, limited in that they cannot expend more money than the legislature appropriates to them. RCW 43.88.130; see also RCW 43.88.070 (“the governor shall exercise all due supervision and control to ensure that expenditure rates are such that program objectives are realized within these maximums”). The addition of the phrase “within available funds” provides the agency with the authority to prioritize among competing needs. Agencies are directed to contract for independent assessments of their quality management systems if, but only if, funds to do so remain “available” after other functions are performed.

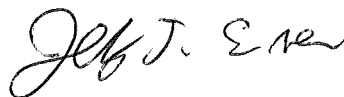
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Legislative history for RCW 43.17.385 does not change this analysis. The phrase “within available funds” was included in RCW 43.17.385(1) and (3) when the statute was originally enacted in 2005. Laws of 2005, ch. 384, § 3. The final bill report for that legislation does not discuss the use of the phrase “within available funds.” As you note in posing your question, the statute initially directed agencies to begin conducting independent analyses of their quality management systems in 2008, but the legislature later delayed this requirement until 2012 as part of the 2009 state operating budget. Laws of 2009, ch. 564, § 931 (amending RCW 43.17.390). In 2012, the legislature amended the current operating budget to remove a provision that would have again delayed the independent assessment provision. Amendment by Representative Miloscia to Second Engrossed House Bill 2127 (adopted April 11, 2012).⁴ That amendment, however, merely resulted in legislative silence that continued current law in place without offering assistance in construing the meaning of the statutory language.

I hope the foregoing information will prove useful. This is an informal opinion and will not be published as an official Attorney General Opinion.

Sincerely



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⁴ The amendment is available online at: <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Amendments/House/2127-S.E2%20AMH%20MILO%20FRAS%20554.pdf> (last viewed July 9, 2012).