

June 14, 2018

DEPT. COMM. NO. 391

VIA EMAIL & HAND DELIVERY (senkouchi@capitol.hawaii.gov)

The Honorable Ronald D. Kouchi
Senate President
415 South Beretania Street
Hawaii State Capitol, Room 409
Honolulu, Hawaii 96813

Re: Audit of the Department of the Attorney General's Asset Forfeiture Program,
Report No. 18-09

Dear President Kouchi:

We are attaching a copy of our *Audit of the Attorney General's Asset Forfeiture Program*, Report No. 18-09, and the Auditor's Summary. The audit was performed pursuant to House Concurrent Resolution No. 4 of the 2016 legislative session (HCR No. 4), which requires the Office of the Auditor to:

- 1) Evaluate the efficiency and effectiveness of the asset forfeiture program of the Attorney General;
- 2) Determine whether the program uses moneys for the purposes intended, pursuant to Chapter 712A, HRS;
- 3) Provide an accounting of money and property seized and disposed of through asset forfeitures under Chapter 712A, HRS;
- 4) Determine how many asset forfeitures occurred in cases that did not result in criminal convictions;
- 5) Follow up on recommendations made in Auditor's Report No. 95-22, *Sunset Evaluation of the Forfeiture Program*; and
- 6) Make recommendations as appropriate.

The report is accessible through our website at:
<http://files.hawaii.gov/auditor/Reports/2018/18-09.pdf>.

If you have questions about the report, please contact me.

Very truly yours,

Leslie H. Kondo
State Auditor

LHK:emo
Enclosure

Audit of the Department of the Attorney General's Asset Forfeiture Program

A Report to the Governor
and the Legislature of
the State of Hawai'i

Report No. 18-09
June 2018



OFFICE OF THE AUDITOR
STATE OF HAWAI'I



OFFICE OF THE AUDITOR STATE OF HAWAII

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Pursuant to Article VII, Section 10 of the Hawai'i State Constitution, the Office of the Auditor shall conduct post-audits of the transactions, accounts, programs and performance of all departments, offices and agencies of the State and its political subdivisions.

The Auditor's position was established to help eliminate waste and inefficiency in government, provide the Legislature with a check against the powers of the executive branch, and ensure that public funds are expended according to legislative intent.

Hawai'i Revised Statutes, Chapter 23, gives the Auditor broad powers to examine all books, records, files, papers and documents, and financial affairs of every agency. The Auditor also has the authority to summon people to produce records and answer questions under oath.

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To improve government through independent and objective analyses.

We provide independent, objective, and meaningful answers to questions about government performance. Our aim is to hold agencies accountable for their policy implementation, program management and expenditure of public funds.

Our Work

We conduct performance audits (also called management or operations audits), which examine the efficiency and effectiveness of government programs or agencies, as well as financial audits, which attest to the fairness of financial statements of the State and its agencies.

Additionally, we perform procurement audits, sunrise analyses and sunset evaluations of proposed regulatory programs, analyses of proposals to mandate health insurance benefits, analyses of proposed special and revolving funds, analyses of existing special, revolving and trust funds, and special studies requested by the Legislature.

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<http://auditor.hawaii.gov>

Auditor's Summary

Audit of the Department of the Attorney General's Asset Forfeiture Program

Report No. 18-09



PHOTO: DEPARTMENT OF THE ATTORNEY GENERAL

IN REPORT NO. 18-09, *Audit of the Department of the Attorney General's Asset Forfeiture Program*, we reviewed the State's asset forfeiture program to evaluate its efficiency and effectiveness, to determine whether the program uses its moneys for the purposes outlined in statute, to account for money and property seized and disposed of through asset forfeitures, and to determine how many asset forfeitures occurred in cases that did not result in criminal convictions. We also followed up on the recommendations made in Auditor's Report No. 95-22, *Sunset Evaluation of the Forfeiture Program*.

What We Found

Our audit found that, even after nearly 30 years since the program's inception, the department has not yet adopted administrative rules describing procedures and practice requirements for asset forfeiture. Without these rules, the program provides only informal, piecemeal guidance to law enforcement agencies and the public. We also found that the asset forfeiture program lacks policies and procedures, and has a program manager who did not guide and oversee day-to-day activities and financial management during our audit period.

Why Did These Problems Occur?

Although efforts have been made toward adoption of rules, the process has been painfully slow, and has not been a priority. In a 2005 report to the Legislature, the department identified adopting rules as a program goal, but then listed that same goal — "promulgating rules, policies and procedures pursuant to Chapter 712A, HRS, for more efficient operation" — in its



What's in a Rule?

UNDER HAWAII LAW, the term "rule" is defined to mean "each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda."

— Section 91-1, HRS

2006, 2007, 2008, 2009, and 2010 reports. In 2011, the department began fielding suggestions from county prosecutors in preparation of drafting rules. In 2013, an Asset Forfeiture Task Force, made up of county prosecutors, provided comments on the department's proposed rules. Draft rules were presented to the Attorney General for approval by mid-2014. However, we found that these rules have been languishing with the Attorney General and have yet to be adopted as of March 2018.

**Total Number and Dollar Amount of Administrative and Judicial Forfeitures
by Type of Property for FY2006–FY2015**



Currency

1,196
forfeitures

\$2,753,198



Firearms

4
forfeitures

\$1,250



**Miscellaneous
Property**

39
forfeitures

\$368,792



Multiple

413
forfeitures

\$4,745,579



Real Property

12
forfeitures

\$1,267,224



Vehicles

597
forfeitures

\$2,449,654

GRAND TOTAL: \$11,585,697

Source: Office of the Auditor

Why Do These Problems Matter?

One result of the lack of consistent, formal rules is the program's high rate of dismissal of administrative forfeiture petitions, because prosecutors are unclear as to the department's requirements for administrative forfeiture. In FY2013–FY2015, the department dismissed 107 petitions for administrative forfeiture — 14 percent of the total filed — for reasons such as lack of probable cause; failure to establish a nexus between the seized property and a covered offense; insufficient notice to property owners of forfeiture procedures; and technical errors in documents. We found dismissal rates were significantly higher on the neighbor islands compared to O'ahu.

Rules are also needed to guide property owners who are seeking remission or mitigation of the forfeiture of their property. It's likely that property held pending forfeiture may lose value; some property may deteriorate or fall into disrepair; and some property may become outdated or obsolete. For some owners, being deprived of their property for any period of time may result in significant hardship. Without clear rules guiding the process for requesting a pardon of the property, these effects are prolonged and exacerbated.

Additionally, without policies, procedures, and a manager to guide and oversee day-to-day activities and financial management, the program cannot fully account for the property it has obtained by forfeiture, is unable to adequately manage its funds, and cannot review or reconcile its forfeiture case data to ensure accurate reporting of information to the Legislature and the general public.

Foreword

Our audit of the Department of the Attorney General's asset forfeiture program was conducted pursuant to House Concurrent Resolution No. 4 of the 2016 Legislative Session.

We express our sincere appreciation to the officers and staff of the Department of the Attorney General, and other individuals whom we contacted during the course of our audit, for their cooperation and assistance.

Leslie H. Kondo
State Auditor



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Forfeiting Accountability: Audit of the Department of the Attorney General’s Asset Forfeiture Program

Introduction

IN REPORT NO. 90-6, *Management Audit of the Narcotics Enforcement Division and the Investigation Division of the Department of the Attorney General*, released in 1990, we reported that the department’s asset forfeiture program lacks rules, policies, and procedures for forfeiture, stating that “[t]he department should have moved faster to draw up appropriate documents covering forfeiture investigation, prosecution, and management and disposition of seized and forfeited property.” We attributed the lack of program structure to it being a low priority and receiving little direction from the department, and we recommended, among other things, “[t]he department should make the development of forfeiture rules, policies, and procedures a top priority. Needed rules should be completed. Policy and procedure manuals dealing with forfeiture administration, investigation, and prosecution should be prepared.”

In Hawai‘i, during the 10-year period from FY2006–FY2015, property valued at \$12.7 million was seized and \$11.6 million in property was forfeited to the State.

Because the bar to seize and forfeit private property in Hawai‘i is so low, the department must manage the program with a heightened degree of transparency and accountability. To do so, department staff and the staffs of county agencies need guidance that is clearly articulated and widely communicated. However, nearly 30 years later, the department has yet to promulgate administrative rules necessary to provide direction to relevant outside stakeholders — including prosecutors, police departments, and those seeking remission or mitigation. The department has also yet to develop clear internal policies and procedures to ensure that petitions for administrative forfeiture are processed in a timely and consistent manner, that forfeited property and program funds are appropriately managed, and that proceeds from the sale of forfeited property are used for purposes intended by the Legislature. As a result, some petitions for forfeiture lingered for more than five years. In addition, the program is unable to accurately account for all the forfeited property and program funds.

We also found significant operational problems relating to the management and disposition of seized and forfeited property. Among other oversights, the department has ignored or was unaware of a number of statutory requirements intended to protect the public, to guide law enforcement agencies in seeking administrative forfeiture, and to fund drug abuse programs. In addition, we found that the program lacks policies and procedures, and has a program manager who did not guide and oversee day-to-day activities and financial management. Guidance is informal and inconsistent, resulting in several oversights, including problems with monitoring forfeited property and inaccurate accounting of funds.

Background

Asset forfeiture is a confiscation of a person’s property by government without any corresponding payment or compensation. In some cases, the property is contraband that is illegal to own; in other cases, the property was allegedly used to commit a crime or was the “fruit of a crime.” Federal and state laws allow both criminal and civil asset forfeitures.

In **criminal asset forfeiture** proceedings, property cannot be seized until its owner has been found guilty beyond a reasonable doubt and convicted of a crime. The forfeiture of assets after a criminal conviction is considered part of the punishment for the crime.

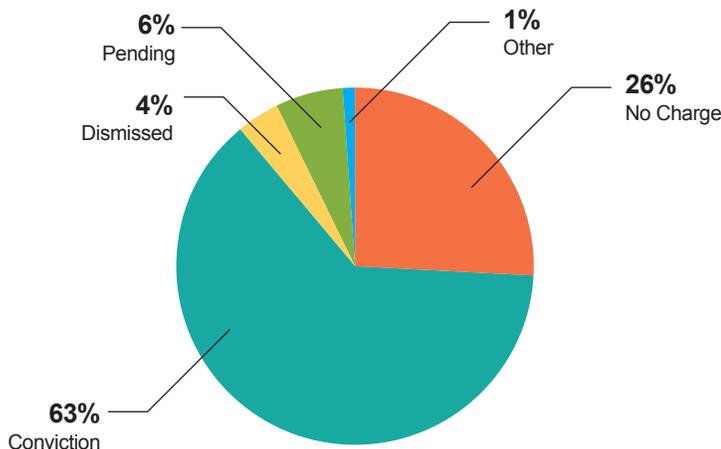
In contrast, **civil asset forfeiture** is an action taken against a person’s property or assets, not against an individual. Civil asset forfeiture is a law enforcement tool that enables police to seize and eventually forfeit property that may be connected to criminal activity. This includes

property that has been directly used in the criminal activity, such as vehicles used to transport narcotics, and property purchased with proceeds from criminal activity. The intent is to remove property that could potentially be used to further criminal activity and to deprive criminals of the profits of crime. In most states, including Hawai‘i, property owners do not have to be convicted of a crime or even arrested to have their property taken.

Under civil asset forfeiture laws, police need only to establish “probable cause” to seize property. What happens after a seizure depends on the jurisdiction, the type of property seized, and the type of forfeiture that is being sought. Prosecutors may also initiate civil forfeiture proceedings in court. Once the prosecutor establishes that the property “more likely than not” was connected to criminal activity — a standard much less than “beyond a reasonable doubt” required for a criminal conviction — the burden falls on the owner to disprove those facts by demonstrating that the owner neither knew of, nor consented to, the property’s illicit use.

Hawai‘i’s administrative asset forfeiture program, established under Chapter 712A, Hawai‘i Revised Statutes (HRS), gives the Department of the Attorney General (the department) power to deprive people of their property. This program allows the State to take personal property, such as cars and currency, without a court hearing, without any compensation, or at times, without even a criminal charge filed against the property owner.

In Hawai‘i, property was forfeited without a corresponding criminal charge in 26 percent of the asset forfeiture cases closed during FY2015. Even when someone is never convicted or charged with a crime, the State nevertheless can forfeit the person’s property under the administrative process overseen by the department. Hawai‘i is one of 38 states that does not require a criminal conviction to authorize forfeiture.



Source: Office of the Auditor



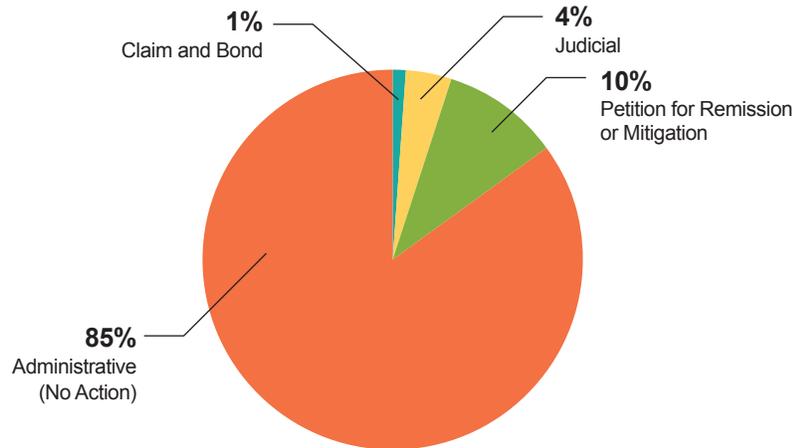
Standards of Proof: Beyond a Reasonable Doubt, Preponderance of the Evidence, and Probable Cause

THE GOVERNMENT’S burden of proof in a forfeiture proceeding is far lower than in a criminal case. In a criminal case, the State generally must prove guilt “beyond a reasonable doubt,” a standard of near certainty. In a civil judicial forfeiture proceeding, the standard of proof is a “preponderance of the evidence,” a more-likely-than-not standard. In an administrative forfeiture proceeding overseen by the department, the prosecutor need only establish that there is “probable cause,” a reasonable belief standard, that the property may be connected to criminal activity.

In Hawai‘i, property was forfeited without a corresponding criminal charge in 26 percent of the asset forfeiture cases closed during FY2015.

About 85 percent of Hawai'i's administrative forfeiture cases went uncontested during FY2006–FY2015. By default, the uncontested case property is deemed forfeited and ownership of the asset is transferred to the government.

See Appendix A for a detailed description of how asset forfeiture works in Hawai'i.



Source: Office of the Auditor

Exhibit 1 details the number and dollar amount of administrative and judicial forfeitures by type of property for FY2006–FY2015.

Exhibit 1
Total Number and Dollar Amount of Administrative and Judicial Forfeitures by Type of Property for FY2006–FY2015

Administrative Forfeitures

ADMINISTRATIVE FORFEITURES are limited to vehicles; property other than real property with an estimated value of less than \$100,000; or any vehicle or conveyance, regardless of value. In contrast, judicial forfeitures include property valued at more than \$100,000, and real property, animals, and certain negotiable instruments.



Currency

1,196 forfeitures
\$2,753,198



Firearms

4 forfeitures
\$1,250



Miscellaneous Property

39 forfeitures
\$368,792



Multiple

413 forfeitures
\$4,745,579



Real Property

12 forfeitures
\$1,267,224



Vehicles

597 forfeitures
\$2,449,654

GRAND TOTAL: \$11,585,697

Source: Office of the Auditor

Exhibit 2 details the number and dollar amount of administrative and judicial forfeitures by type of crime for FY2006–FY2015.

Exhibit 2 Total Number and Dollar Amount of Administrative and Judicial Forfeitures by Type of Crime for FY2006–FY2015



Source: Office of the Auditor

Audit Objectives

Public concerns that the State may be abusing its asset forfeiture powers spurred the adoption of House Concurrent Resolution No. 4 of the 2016 Legislative Session (HCR No. 4). The audit objectives are described below.

1. Evaluate the efficiency and effectiveness of the asset forfeiture program of the Attorney General.
2. Determine whether the program uses moneys for the purposes intended, pursuant to Chapter 712A, HRS.
3. Provide an accounting of money and property seized and disposed of through asset forfeitures under Chapter 712A, HRS.
4. Determine how many asset forfeitures occurred in cases that did not result in criminal convictions.

5. Follow-up on recommendations made in Auditor's Report No. 95-22, *Sunset Evaluation of the Forfeiture Program*. (See **Appendix B**)
6. Make recommendations as appropriate.¹

Audit Scope and Methodology

To achieve our audit objectives, we reviewed relevant statutes, draft administrative rules, program policies and procedures, and other written guidance related to the program. We examined forfeiture case files, program annual reports, and program data, records, and other documents, including information from county prosecuting attorneys' offices and other agencies. We also conducted interviews with department personnel involved with the program, as well as staff from other agencies, such as county prosecuting attorneys' offices and the county police departments.

Our audit was performed from June 2016 through January 2017, and was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe the evidence we obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

We did not examine the internal processes of the police departments or prosecutors' offices, those organizations' policies and procedures, or the asset forfeiture process through the court system. Such review was beyond the scope of this audit.

Summary of Findings

1. After nearly 30 years, administrative rules describing the procedures and practice requirements for asset forfeiture have not been adopted by the department. Without them, the program provides informal, piecemeal guidance to law enforcement agencies and the public.
2. The asset forfeiture program lacks policies and procedures, and has a program manager who did not guide and oversee day-to-day activities and financial management.

¹ In addition to our audit objectives, HCR No. 4 requested that we provide an assessment of the socioeconomic status of individuals whose assets have been forfeited. However, we found that neither the Attorney General nor the prosecutors record or otherwise maintain such information. For that reason, we are unable to provide the requested analysis.

Absent administrative rules, the program provides informal, piecemeal guidance to law enforcement agencies and the public.

Hawai‘i’s asset forfeiture program has gone without administrative rules since its inception almost 30 years ago. This is despite recommendations from this office and the fact that the program can adopt rules without having to comply with the formal rulemaking requirements of Chapter 91, HRS. Although efforts have been made toward adoption of rules, the process has been painfully slow, and the implementation of rules has not been a priority.

Until rules are adopted describing the procedure and practice requirements for forfeiture, law enforcement agencies must rely on informal, piecemeal guidance from the department and on their colleagues’ institutional knowledge. This approach of using informal direction, instead of properly promulgated rules to provide instruction to county police and prosecuting attorneys about program procedures and requirements, poses a significant risk to program operations.

Asset forfeiture rules have not yet been enacted, despite years of planning.

When the Legislature enacted Chapter 712A, HRS, it expressly noted its intention that the department provide the details needed to implement the administrative asset forfeiture program through administrative rules – governing the entire process, from the filing of the petition for forfeiture to the disposition of forfeited property and the use of the proceeds from the sale of forfeited property. To streamline the process, the Legislature waived the public hearing and other procedural requirements generally required by the Hawai‘i Administrative Procedure Act, codified as Chapter 91, HRS, to adopt administrative rules.

The department began contemplating making rules shortly after the asset forfeiture law was passed in 1988, but in the intervening decades, has made no real progress toward that end. In a 2005 report to the Legislature, the department identified adopting rules as a program goal, but listed that same goal — “promulgating rules, policies and procedures pursuant to Chapter 712A, HRS, for more efficient operation” — in its 2006, 2007, 2008, 2009, and 2010 reports. In 2011, the department began fielding suggestions from county prosecutors in preparation of drafting rules. In 2013, an Asset Forfeiture Task Force, made up of county prosecutors,

Pending Draft Rules

THE DRAFT RULES currently pending Attorney General approval describe the information that prosecutors must include in the petitions for administrative forfeiture, “[i]n addition to the requirements set forth in Section 712A-10, HRS”:

- A statement that all requirements and deadlines have been met;
- An itemized list of seized property and estimated value of each item in the caption of the petition;
- For seized vehicles, the vehicle identification number (VIN) of those vehicles;
- The applicable covered offense upon which the property is subject to forfeiture;
- The identity of all persons who have an interest in the property;
- A copy of the police report pertaining to the covered offense and in support of the probable cause for the covered offense; and
- The notice of intention to administratively forfeit property.

The draft rules also include the procedure to refile and amend petitions, to withdraw petitions, and to request an extension to refile petitions.

In addition to providing direction as to what information must be included with a petition for administrative forfeiture, the draft rules specify certain requirements that are directly applicable to owners of or others claiming an interest in seized property. For instance, the draft rules detail the process by which someone who is not identified as an “interested party” in an administrative forfeiture proceeding must petition for remission or mitigation, as well as the procedure governing the return of property to owners and interested parties.



What's in a Rule?

UNDER HAWAI'I LAW, the term "rule" is defined to mean "each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda."

— Section 91-1, HRS

provided comments on the department's proposed rules. Draft rules were presented to the Attorney General for approval by mid-2014.

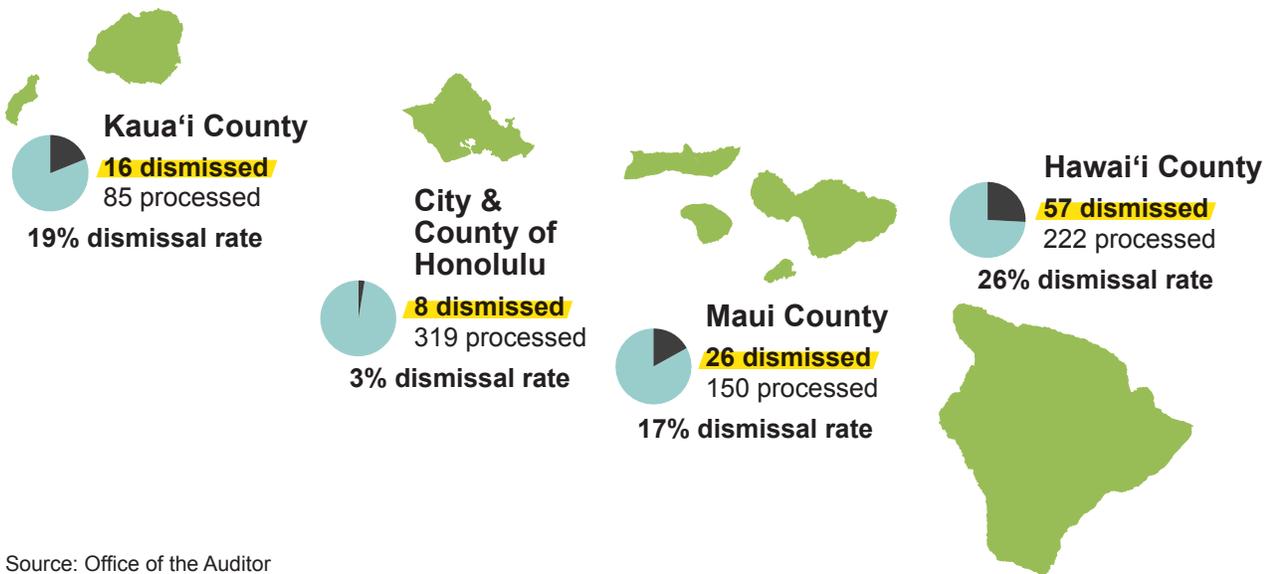
However, we found that these rules have been languishing with the Attorney General and have yet to be adopted as of March 2018. When asked about the delay in implementing rules, the then-first deputy attorney general conceded that the rules "fell through the cracks."

According to the department, it issued informal guidelines to law enforcement in 2014; however, during our fieldwork in 2016, we found that one of the four county prosecutors' offices could not locate those guidelines.

A result of the lack of consistent, formal rules is the program's high rates of petitions for administrative forfeiture have been dismissed because prosecutors are unclear as to the department's requirements for administrative forfeiture. For instance, from FY2013–FY2015, the department dismissed 107 petitions for administrative forfeiture — 14 percent of the total filed — for reasons such as lack of probable cause; failure to establish a nexus between the seized property and a covered offense; insufficient notice to property owners of forfeiture procedures; and technical errors in documents. We found dismissal rates were significantly higher on the neighbor islands compared to O'ahu, as shown in Exhibit 3 below. While just 3 percent of the petitions filed by the City and County of Honolulu were dismissed by the Attorney General from FY2013–FY2015, 26 percent of petitions from Hawai'i

Exhibit 3

Number of Petitions Processed and Dismissed by County for FY2013–FY2015



Source: Office of the Auditor

County, 19 percent from Kaua'i County, and 17 percent from Maui County were dismissed during that same period.

As part of our assessment of the department's administration of its portion of the asset forfeiture program, we did not contact individuals whose property was returned; however, it is likely that property held pending forfeiture may lose value; some property may deteriorate or fall into disrepair; and some property may become outdated or obsolete. And, for some owners, being deprived of their property for any period of time may result in significant hardship.

Rules are needed to guide claimants seeking remission or mitigation of the forfeiture.

The lack of administrative rules also directly impacts the owners of the property that law enforcement has petitioned to forfeit. The asset forfeiture law allows owners and others claiming an interest in the seized property to petition the Attorney General to pardon the property, in whole or in part, because of mitigating circumstances that do not amount to a legal defense to forfeiture. Depending on the circumstances, the Attorney General can remit or return the property to the claimant or can mitigate the forfeiture by returning the property to the claimant upon payment of a fine.

While the statute identifies the information that a person seeking remission or mitigation must provide, it does not address a number of issues relating to the process. The draft administrative rules include provisions relating to:

- Calculation of time for petitions for remission or mitigation transmitted via U.S. Postal Service;
- Requests for an extension of time in which to file a petition for remission or mitigation;
- Process by which someone who is not named in the petition for administrative forfeiture can seek remission or mitigation; and
- Prosecutor's ability to oppose any petition for remission or mitigation.

We found that these petitions constitute a small portion of the total forfeiture cases processed by the department and that the number processed sharply declined overall between FY2012–FY2015, as shown in Exhibit 4.

Child Support

THE CHILD SUPPORT ENFORCEMENT AGENCY (CSEA) filed 16 petitions for remission or mitigation against forfeited property, which had been owned by a parent who was delinquent in his or her child support payments. The department took, on average, **over five years** to render decisions denying the petitions. The asset forfeiture statute requires the department to issue its written decision on petitions for remission or mitigation within 60 days after receipt of the petition, unless circumstances of the case require additional time. The Civil Recoveries Division asked the department's Appellate Opinion Review Committee for its opinion on whether CSEA's interest was sufficient to petition for remission or mitigation in October 2014; however, only after we called attention to the delays during our audit did the Attorney General resolve the cases. Although the total value of the forfeited property was only \$21,474, the program's ability to use the money, including funding drug prevention programs, was significantly delayed.

“Extenuating” or “mitigating” circumstances

PETITIONERS SEEKING remission or mitigation must show that they:

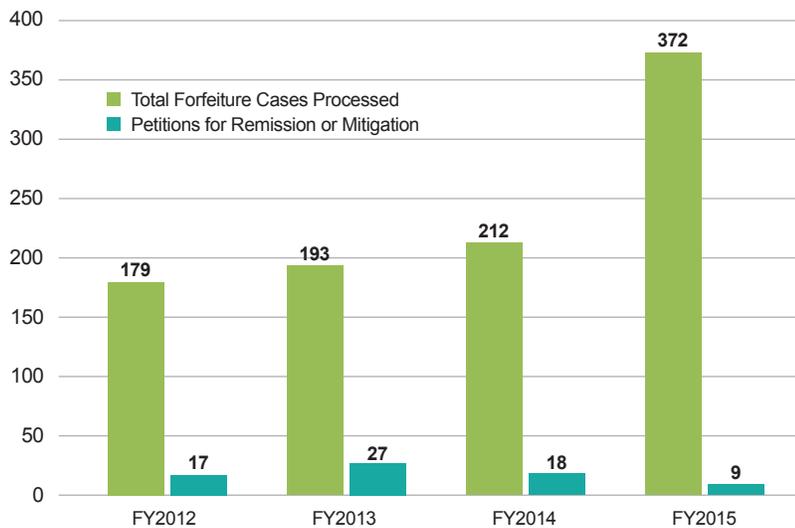
- Own or hold an interest in the seized property as defined by section 712A-1;
- Had any knowledge that the property was or would be involved in any violation of the law;
- Had any knowledge of the particular violation which subjected the property to seizure and forfeiture; and
- Had any knowledge that the user of the property had any criminal record, including arrests, for the violation which subjected the property to seizure and forfeiture or for any crime which is similar in nature.

Extenuating circumstances that may support mitigation of the forfeiture include:

- Language or culture barrier;
- Humanitarian factors, such as youth or extreme age;
- Presence of physical or mental disease, disorder, or defect;
- Limited or peripheral criminal culpability;
- Cooperation with the seizing agency or the prosecuting attorney; and
- Any contributory error on the part of government officials.

Exhibit 4

Ratio of Petitions for Remission or Mitigation to Total Forfeiture Cases Processed in FY2012–FY2015



Source: Office of the Auditor

It was beyond the scope of our audit to contact people whose property was forfeited. We, therefore, do not know whether they did not file a petition for remission or mitigation because they were unaware that they could do so. Because the bar to forfeit private property is low, we emphasize our belief that the program must ensure that a property owner is afforded every opportunity to retain ownership of his property or to mitigate any hardship caused by the forfeiture. The department has not done so. As a first step, the department must promulgate administrative rules that clearly dictate the procedures for seeking remission or mitigation.

Rules are needed to govern the storage, preservation, and disposal of forfeited property.

Once property is declared forfeited, through either administrative or judicial forfeiture, ownership of the property transfers to the State. The department can sell forfeited property through public auction, with proceeds deposited in the Criminal Forfeiture Fund and used to fund the program; can transfer forfeited property to a State or county agency; can sell or destroy forfeited property used to manufacture a controlled substance; or can make any other disposition of forfeited property as allowed by law.

In practice, most forfeited property is held by the county police departments — in evidence rooms and impound lots — and the department generally does not take physical possession of the property until right before auctions, which are held on O‘ahu. However, without administrative rules directing police departments in the storage and preservation of forfeited property, we found that some forfeited property — i.e., State property — can deteriorate, sometimes to the point of rendering the property worthless. For example, the supervising deputy attorney general described a vehicle that had been stored in an uncovered lot with its windows down as “looking like a terrarium,” with mold and plants growing in the vehicle’s interior. He recounted that the department had considered “junking” the vehicle, which was a relatively new Toyota Scion, but ultimately paid someone to clean and restore the car’s interior. In another case, the supervising deputy attorney general recalled a vehicle on Hawai‘i Island that was in “decent shape,” but thieves broke into the police impound lot and stripped it of its parts, leaving only the chassis.

We also found that police departments routinely destroy forfeited property — again, State property — without the department’s approval and, in some instances, without the department’s knowledge. And, the department does not require the police to provide documentation or “proof” that the property was, in fact, destroyed. Although the department has procedures for the destruction of forfeited property in its possession, including the requirement that the Attorney General approve the destruction, there are no rules or even informal procedures for the destruction of forfeited property held by the police departments. According to the department, the property destroyed by police typically is either contraband or has little to no value; however, we found that police departments destroyed, among other things, a change machine, a surveillance monitor, and a television monitor — property that seemingly had value — without Attorney General approval. The supervising deputy attorney general was unaware that change machines had been destroyed, but agreed that the machines could have had some value.



A Long Process

DURING THE TWO-YEAR period from July 2012 through July 2014, the program took **over a year and a half, or 561 days**, on average, to process a petition for administrative forfeiture, starting from the program’s receipt of the petition through the department’s disposition, which, in the vast majority of cases, was the issuance of an order for administrative forfeiture.



Temporary Fix?

IN JULY 2014, the department transferred the asset forfeiture program from its Criminal Justice Division to the Civil Recoveries Division. According to the Attorney General, the program was “more appropriately coherent” with the Civil Recoveries Division’s mission and the transfer was necessary to administer the program more effectively and efficiently.

Following the transfer to the Civil Recoveries Division, there have been several changes to streamline the administration of forfeiture cases. For example, the department:

- Developed schedules for publishing notices of intent for forfeiture for each county;
- Issued informal guidance to county prosecutors about the information that the department expects to be included in petitions; and
- Temporarily increased the amount of time allocated to the program by a deputy attorney general from 15 to 50 percent of the deputy’s work.

As a result of these changes, the department reduced the backlog of pending forfeiture petitions from approximately 345 in July 2014 to 44 as of June 30, 2015. We believe that many of the improvements to the program, such as improving communication with prosecutors and reducing the backlog of petitions, should be attributed to the supervising deputy attorney general’s efforts. However, notwithstanding his commitment to the program, we found that the department has not developed formal management policies and procedures to memorialize the processes program staff must follow to more effectively and efficiently administer the program.

Program lacks policies, procedures, and a manager to guide and oversee day-to-day activities and financial management.

The program is administered by three full-time staff, with the assistance of a deputy attorney general whose time is partially allocated to the program. A program manager is responsible for the proper administration of the overall program. However, we found the program manager does not actually manage the program and was not hired for that specific purpose; instead, the program manager serves only as a property manager, in charge of overseeing forfeited property. Other management responsibilities, such as the establishment of program procedures, as well as accounting for program costs and proceeds, are handled by various individuals, instead of a dedicated program manager. Guidance is informal and scattered, resulting in several oversights, including problems with monitoring forfeited property, and inaccurate accounting of funds.

The program cannot fully account for the property it has obtained by forfeiture.

Once a forfeiture order is issued, the property being forfeited becomes the State’s property. However, the majority of forfeited property is stored by the police, and the department does not take possession of the property until shortly before it is auctioned on O’ahu. We found that the department does not maintain a complete inventory of forfeited property. The program manager told us that he only maintains a list of the property that is stored in the department’s warehouse and is scheduled to be auctioned. He questioned the necessity of documenting forfeited property that the department did not physically possess. He also does not consistently document instances in which police destroy property forfeited to the State.

Without a record of the property destroyed by the police, the program is unable to fully account for State property. The program’s legal assistant is responsible for updating its FileMaker database to reflect sold items after an auction is completed; however, the legal assistant only keeps track of items that have been auctioned. As a result, the disposition of forfeited property that has not been auctioned, whether destroyed or kept for use by law enforcement, is unknown. Such property in question is classified as “pending sale” in the program’s database. At the end of FY2015, the amount of property classified as such, which the department cannot fully account for, totaled \$1.56 million.

Missing basic accounting functions, the program is unable to adequately manage its funds.

Program costs, including salaries of program staff, are funded by 50 percent of the forfeited cash and proceeds generated from the sale of forfeited property deposited into the Criminal Forfeiture Fund. The remaining 50 percent is distributed to police and prosecutors, who each receive 25 percent of the forfeited cash and sale proceeds that can be used for law enforcement purposes, such as equipment and training.

When establishing internal controls over key activities, government managers should segregate the duties and responsibilities among different people, regularly review performance, and document these duties and reviews. The asset forfeiture program does not have any of these basic internal controls in place. For example, the program's legal assistant, who does not have an accounting background, performs most major daily financial functions, including accounting-related data entry, as well as numerous other accounting and data functions. Neither management nor other staff review this data for accuracy.

We also found that the legal assistant does not produce monthly or quarterly fund balance reports that are essential to facilitate managerial decision-making. Instead, the legal assistant reconciles program expenditures annually, for the sole purpose of reporting to the Legislature. Management does not review the yearly reconciliation. In any case, such annual reconciliations do not provide up-to-date accounts of errors or misstatements, so an accurate fund balance cannot be known in a timely fashion. In brief, the department does not know at year's end, or at any given time, whether adequate funds exist to meet program needs.

The program has an informal policy of keeping \$250,000 on reserve in the fund to pay for operating expenses. However, since it does not produce monthly or quarterly fund balance reports, and management does not review the yearly reconciliation that it does prepare, the program has no way of knowing if it is complying with its minimum balance policy. For instance, we found that in FY2014, the program's year-end fund balance fell below the threshold at \$182,000.

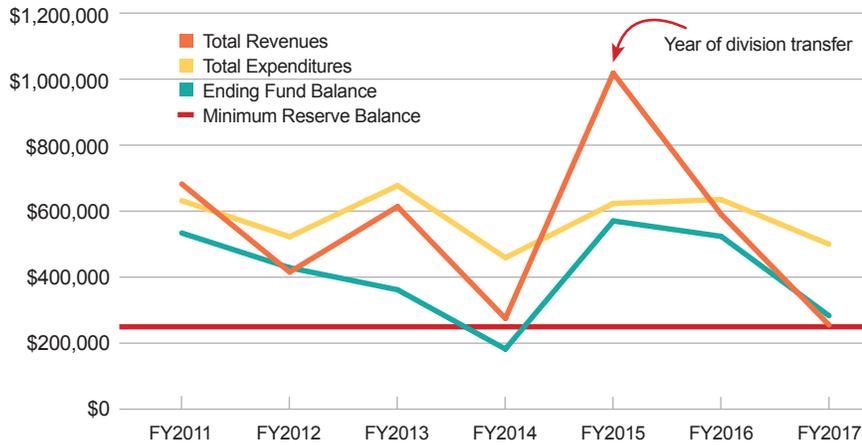


Internal Controls

ACCORDING TO the U.S. Government Accountability Office's Standards for *Internal Control in the Federal Government*, internal controls are an integral component of an organization's management that provides reasonable assurance that the following objectives are being achieved: effectiveness and efficiency of operations; reliability of reporting; and compliance with applicable laws and regulations. Internal controls comprise the plans, methods, and procedures used to meet the organization's mission, goals, and objectives. Internal controls help government program managers achieve desired results through effective stewardship of public resources.

Exhibit 5 compares the program's revenues, expenditures, and fund balance for the past seven fiscal years.

**Exhibit 5
Criminal Forfeiture Fund Revenues, Expenditures, and Fund Balance for FY2011–FY2017**



Source: Office of the Auditor

In five of the last seven fiscal years, expenditures exceeded revenues, resulting in a declining fund balance. In FY2011, the fund balance was almost \$540,000, while the fund balance in FY2017 now stands at \$284,931. Without proper forecasting of revenues and expenditures, the fund may no longer be financially self-sustaining, which is in direct violation of the statutory requirement specifying that revolving funds must be financially self-sustaining.

From FY2004–FY2017, the asset forfeiture program deposited \$10.2 million into the Criminal Forfeiture Fund. The required 20 percent of deposited moneys to support drug abuse education, prevention, and rehabilitation programs was never disbursed.

The department has not allocated \$2 million for drug prevention efforts, as required by law.

Calling drug abuse a “growing concern in society” and noting that “education, prevention, and rehabilitation programs play a major role in reducing the number of substance abusers in the State,” the Legislature enacted Act 104, Session Laws of Hawai‘i 1996, requiring that the department allocate 20 percent of moneys deposited into the Criminal Forfeiture Fund to support drug abuse education, prevention, and rehabilitation programs. From FY2004–FY2017, the asset forfeiture program deposited \$10.2 million into the Criminal Forfeiture Fund. Accordingly, the department was supposed to allocate a total of \$2 million for drug programs; however, we could not identify any program disbursements that complied with this requirement.

The Legislature enacted Hawai‘i’s asset forfeiture program to help address drug crimes by directing proceeds from forfeited assets to

programs which aim to prevent abuse of illegal drugs. Drug-related offenses constitute a significant portion of the covered offenses that trigger asset forfeiture. We found that from FY2006–FY2015, drug-related offenses made up 78 percent of the covered offenses that resulted in forfeiture cases. The property seized in those cases totaled approximately \$7.7 million, or 67 percent of the total estimated value of all property forfeited to the State during that 10-year period.

The current and past program supervising deputy attorneys general and the program’s legal assistant were unaware of this provision in Act 104. In addition, there is no guidance for distributing funds to drug abuse education, prevention, and rehabilitation programs in the Attorney General’s draft administrative rules governing the use of moneys in the Criminal Forfeiture Fund (Rule 712A-16.4.1). The rule states only that distributions are made according to Section 712A-16(4), HRS, which does not mention a fund allocation to drug abuse programs. As of March 2018, the program has not developed any internal policies or procedures to ensure that this allocation is made to comply with Act 104.

The program does not review or reconcile forfeiture case data.

According to the U.S. Government Accountability Office’s *Standards for Internal Control in the Federal Government*, management should use quality information to make informed decisions and evaluate performance. Quality information is appropriate, current, complete, accurate, accessible, and timely. To obtain quality information, the underlying data used must come from reliable sources that are reasonably free from error and bias, and faithfully represent what they purport to represent. However, we found numerous inaccuracies in the department’s data, including the data in annual reports to the Legislature. Reporting unreliable information inhibits the Legislature’s ability to oversee and make informed policy decisions about the program.

To ensure that reliable data is used, management should segregate key duties and responsibilities among different people to reduce the risk of error, misuse, or fraud. This includes separating responsibilities for processing and recording transactions, and reviewing them so that no one individual controls all key aspects of a transaction or event. As is the case for financial reporting, other data entry and reporting duties are not segregated. No one, except the legal assistant, who inputs the information into the FileMaker database, reviews the data, checking for accuracy against the case files from which the legal assistant gathered the information.

As a result, we found numerous discrepancies between data input into the FileMaker database and source documents. We reviewed 29 case

files and found that eight were recorded inaccurately. Errors included incorrect or missing dates in various fields, an incorrectly reported seizing agency, and erroneous police report numbers.

We found many other data inaccuracies within the annual legislative reports, which included duplicate forfeiture information reported in two fiscal years, and several instances of discrepancies between the number of cases processed and petitions filed that do not add up to the total sum reported.

The program lacks a system to properly account for refiled forfeiture cases.

The department uses a separate ProLaw database to manage and track administrative forfeiture petitions received and dismissed by the Attorney General. However, we found that the database does not properly account for cases that have been dismissed for various technical or procedural issues, and are subsequently refiled by prosecutors. Thus, this information reported to and relied on by the Legislature is not always accurate.

We found 217 cases from FY2006–FY2015 that were identified in the database as dismissed, but were refiled by prosecutors. The estimated value of the property involved in those cases totaled \$1.52 million.

The supervising deputy attorney general told us that the program has struggled to track refiled cases. The program's ProLaw database issues a unique number to each petition entered into the system, including petitions refiled for previously dismissed forfeiture cases. He said the database cannot create customized case numbers, which would enable staff to more easily identify and account for dismissals. The program's lack of a systematic process to identify dismissed cases increases the risk that the department may double-count cases and overstate reported seized property values.

Conclusion

Hawai'i's asset forfeiture program is controversial, attracting criticism from lawmakers, the public, and the media. The statute gives the Attorney General broad power to take personal property from individuals without judicial oversight based on a relatively low standard of proof. Given the high profile of the program and the power bestowed on the Attorney General to administer it, it is crucial that the department manage the program with the highest degree of transparency and accountability. We found that is not the case. The department has failed to adopt administrative rules as required by statute, establish formal

management policies and procedures, and implement strong internal controls.

Recommendations

The Department of the Attorney General should:

1. Promulgate administrative rules necessary to provide direction to county prosecutors, police departments, and those seeking remission or mitigation.
2. Develop clear internal policies and procedures to ensure that petitions for administrative forfeiture are processed timely and consistently, that forfeited property and program funds are appropriately managed, and that proceeds from the sale of forfeited property are used for purposes intended by the Legislature.
3. Strengthen internal controls to provide transparency and accountability for forfeited property and program funds by:
 - a) Establishing basic accounting policies and procedures to properly account for program revenues and expenditures;
 - b) Maintaining a complete listing of forfeited property with estimated values for each property; and properly accounting for transactions for each property auctioned, destroyed, or kept for use by law enforcement;
 - c) Assigning the periodic and annual reconciliation of and reporting on the Criminal Forfeiture Fund to the department's fiscal section;
 - d) Preparing a short- and long-term forecast of revenues and expenditures of the Criminal Forfeiture Fund to ensure self-sustainability; and
 - e) Ensuring the department complies with Act 104, Session Laws of Hawai'i 1996, which requires the allocation of 20 percent of moneys deposited into the Criminal Forfeiture Fund be used to support drug abuse education, prevention, and rehabilitation programs.

Office of the Auditor's Comments on the Department of the Attorney General's Response

WE PROVIDED A DRAFT OF THIS REPORT to the Department of the Attorney General on May 31, 2018, and met with the Attorney General, First Deputy Attorney General and the Supervising Deputy Attorney General of the Civil Recoveries Division on June 8, 2018, to discuss our findings and recommendations. The department offered its written response to the draft report on June 12, 2018, which is included as Attachment 1.

The department agreed with our findings and recommendations and reported that it has taken numerous steps to address and implement them. For instance, the department noted that during our audit it renewed its focus on the promulgation of administrative rules, and those efforts have yielded an updated draft, which is currently under internal review. According to the department, since the period of our audit, the average time that a petition remains pending continues to shorten, and we agree that the adoption of administrative rules — and the clarity and uniformity that they bring — will likely result in improved outcomes.

In its response, the department expressed that it “strive[s] to remain true to the foundational objectives” of the program; however, as we reported, the department has not allocated 20 percent of the moneys deposited into the Criminal Forfeiture Fund to support drug-abuse education, prevention, and rehabilitation programs, as expressly directed by the Legislature. (See Act 104, Session Laws of Hawai‘i 1996.) As it continues to seek ways to improve the program, we urge the department to not lose focus on its legislative mandate to allocate 20 percent of the forfeited cash and the proceeds derived from the forfeited property to support those types of programs.

DAVID Y. IGE
GOVERNOR



RUSSELL A. SUZUKI
ATTORNEY GENERAL

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June 12, 2018

Mr. Leslie H. Kondo
State Auditor
Office of the Auditor
465 S. King St., Rm. 500
Honolulu, Hawaii 96813-2917

Re: Audit of the Attorney General's Asset Forfeiture Program

Dear Mr. Kondo:

Thank you for the opportunity to work closely with your team as they conducted the audit of our asset forfeiture program. Your team's conduct, in particular their professionalism and courteousness throughout the process, was exemplary. We sincerely appreciate your objective review of the program and will take to heart your team's recommendations on how best to improve upon our performance and the overall functionality of program.

1. The Administrative Rules

One of the major deficiencies identified in the audit report was the lack of clarity and uniformity in program administration. When the Legislature established the program, it granted authority and responsibility to the Department of the Attorney General to establish administrative rules in order to provide such structure and clarification. Unfortunately, the process was "painfully slow" and to date, administrative rules governing the program have yet to be adopted.

The Department of the Attorney General understands the importance of promulgating the administrative rules and is committed to making them a priority. As pointed out in the audit report, we have already drafted the administrative rules, but they are still pending final review and approval. However, with a renewed focus based upon working with your team during the audit, we have since identified a number of issues that had not been addressed in the prior draft of the rules so have made necessary revisions and added several new sections to provide needed uniformity and structure. The updated set of rules has recently been completed and, following final internal review, will be sent out shortly to the various counties for review and comment.

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June 12, 2018
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For example, one of the issues that the audit report noted was a lack of accounting for State property that was destroyed by the counties, sometimes without either knowledge or approval from the Attorney General. It was common practice for the counties to include in their petitions for forfeiture contraband items, such as gambling machines, as property subject to administrative forfeiture. Often, after such a petition was granted, the contraband items would be included as subject property and forfeited to the State. However, because of the illegal nature of these items, the counties would destroy them once these items were no longer needed as evidence in criminal proceedings. To address this problem, we added a section in the rules to address contraband items, specifically excluding them from the listing of subject property in petitions for forfeiture. In addition, we added potential sanctions for any failure to comply with the requirements of the administrative rules.

2. Asset Forfeiture Program Manager

Another program deficiency identified in the audit report was that the program manager was not involved in overseeing the day-to-day operations and financial management of the program. During the time of the audit, the program manager was primarily responsible for overseeing the management of subject property. As pointed out in the report, the other responsibilities were divided up and performed by different staff within the program.

Since the audit, the program manager has assumed positional responsibilities over the day-to-day operations, as well as the financial management. While not yet completely proficient in all aspects, he is progressing in the right direction. The program manager has become familiar with and now utilizes the various reporting programs used to keep track of program funds, including maintaining the program's master ledger and the various financial accounts of the program. The program manager has also assumed responsibility for processing all currency deposits and all program expenditures. The program is considering implementing procedures to have various staff members serve as secondary checks on these processes by requiring the additional review of specific aspects of the transactional reports in order to verify accuracy and to safeguard against errors and abuse. The program is also considering new reporting methods to better account for property which has been forfeited to the State, to improve tracking property still in possession of the counties and the properties turned over to the State, as well as performing periodic reconciliation reports.

3. Efficiency

The audit report identified concerns with the overall efficiency with which petitions for forfeiture have been processed. The report raised questions regarding the lack of corresponding criminal charges, "the program's high rates of petitions ... dismissed", and the average time that petitions remain pending prior to disposition.

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With regards to the number of forfeiture cases that have corresponding criminal charges filed, the Attorney General does not have access to this information because the determination whether or not to pursue criminal charges in each matter is an independent determination made by the prosecuting attorney and law enforcement agency. However, we are aware of many instances in which there are communications between the law enforcement agency and the owners of seized property that result in settlement stipulations whereupon the owners agree to relinquish part of or the entire interest in the seized property. Sometimes these agreements are entered into even prior to the filing of a petition for forfeiture. We believe in many cases that these types of agreements result in the decision by the prosecuting attorney and law enforcement agency to forego criminal charges against the interested owners. We have attempted to address this system flaw in the current draft of the rules.

The report also took note of the high rate of petitions being dismissed as a result of "the lack of consistent, formal rules." However, in most cases, the reasons for these dismissals were "lack of probable cause; failure to establish a nexus between the seized property and a covered offense; insufficient notice to property owners of forfeiture procedures; and technical errors in documents." We would point out that these legally determined bases for dismissal were established outside the control of the Department of the Attorney General. We do acknowledge that the dismissals attributable to technical errors may be due to the lack of administrative rules. Nonetheless, as noted above, since the audit was completed, we have made the adoption of administrative rules that will detail the procedural requirements of the asset forfeiture process for both agencies and private individuals one of the Department's top priorities.

In reviewing forfeiture matters between 2005 and 2017, the audit report identified concerns with the amount of time a petition for forfeiture may remain pending, prior to final disposition. After the program was transferred to the Civil Recoveries Division, the Department of the Attorney General sought to address this, as seen by the significant decrease in backlog cases from July 2014 through June 2015. Since the time of the audit, the average time that a petition remains pending has continued to improve. For FY2017, there were 73 forfeiture cases filed, including both administrative and judicial forfeitures. The average amount of time between the filing of the petition and disposition for these cases was 145 days. The average processing time of administrative forfeitures only was 129 days. When the administrative rules are adopted, we are hopeful that the average amount of time a petition is pending will decrease even further.

4. Use of Funds for Intended Purposes

As we strive to remain true to the foundational objectives of the asset forfeiture program in its administration, we recognize the importance of utilizing funds forfeited to the State for the intended purposes. We will continue to seek ways to accomplish this,

Mr. Leslie H. Kondo
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specifically in supporting drug abuse education, prevention, and rehabilitation programs.

Again, we are grateful to have had this opportunity to work closely with your office and for the valuable insight and guidance provided throughout the process and in the final audit report.

Sincerely,



Russell A. Suzuki
Attorney General

APPENDIX A

How Asset Forfeiture Works in Hawai'i

What Types of Crimes are Subject to Forfeiture?

HAWAII'S ASSET FORFEITURE LAW authorizes forfeiture of property seized by police in connection with certain criminal offenses, called "covered offenses." Covered offenses include a wide range of crimes, from violent crimes, such as murder and kidnapping, to promoting prostitution, gambling, and drug trafficking. Other covered offenses include labor trafficking, criminal property damage, robbery, bribery, theft, money laundering, insurance fraud, solicitation of a minor for prostitution, and the manufacture, sale, or distribution of a controlled substance. In addition, contraband and untaxed cigarettes, as well as proceeds and property acquired as a result of or derived from the commission of a covered offense, are subject to forfeiture.

Prior to 1988, Hawai'i's various forfeiture provisions were found in different sections of the Hawai'i Revised Statutes (HRS), such as the Uniform Controlled Substances Act, the Organized Crime Chapter, and the Penal Code. In 1988, the Legislature passed the Hawai'i Omnibus Criminal Forfeiture Act, codified as Chapter 712A, HRS. The Act, modeled after federal forfeiture law, was intended to consolidate forfeiture under a single statute and to clarify the types of offenses and property subject to forfeiture. Initially, the law was scheduled to "sunset" on July 1, 1990. That repeal date was subsequently extended to July 1, 1993 and further extended to July 1, 1996. In 1996, the Legislature repealed the sunset provision of the Omnibus Criminal Forfeiture Act, making the provision permanent.

In Hawai'i, police can seize property for forfeiture without a warrant and need only probable cause, i.e., "a reasonable belief," that the property has a substantial connection to certain criminal offenses, called "covered offenses." Prosecutors may pursue forfeiture of seized assets through either of two types of civil proceedings, both of which are separate and distinct from any criminal proceeding: (1) judicial forfeiture through the courts, or (2) administrative forfeiture through a program overseen by the department. Administrative forfeiture is limited to vehicles, regardless of value, and property other than real property with an estimated value of less than \$100,000.

In an administrative forfeiture action, the prosecutor initially reviews the case to determine whether there is probable cause that the property is substantially connected to a covered offense, and if so, files a petition for forfeiture with the department. The prosecutor is required to give notice of the pending forfeiture to the property owner and anyone else known to have an interest in the seized property, with instructions for contesting the forfeiture or to seek remission or mitigation of the forfeiture. The department must publish notice of the administrative forfeiture of the property in a newspaper of general circulation in the county in which the seizure occurred.

The department reviews petitions for forfeiture to assess, among other things, whether probable cause exists to justify the seizure of the property, the criminal offense is one for which forfeiture is allowed, and the prosecutor has given the required notice of the pending forfeiture. If the petition is incomplete, the prosecutor has not satisfied the notice requirement, or the information contained therein does not establish the requisite probable cause, the department can dismiss the petition, generally, without prejudice. The prosecutor can refile a petition for forfeiture of the property.

Within 30 days of notice, any person claiming an interest in the property may seek judicial review of the seizure and the proposed forfeiture by filing a claim and a bond in the amount of 10 percent of the estimated value of the property or \$2,500, whichever is greater. If the person claiming an interest in the property fails to prove that his interest is exempt from forfeiture, the claimant is responsible to pay the State's costs and expenses, including attorney's fees, incurred in the judicial proceeding.

A person claiming an interest in the seized property can also petition the department to "pardon" the property, in whole or in part. Such a request, called a petition for remission or mitigation, does not contest the sufficiency of the evidence supporting the seizure, but rather, requests that the department consider factors such as whether the person had knowledge that the property was or would be involved in a criminal offense and other extenuating circumstances. The department, in its sole discretion, can decide to pardon the property, in whole, and return it to the claimants. Or, if the department determines that some relief should be granted to avoid extreme hardship, the department can mitigate the forfeiture by returning the property after the claimant pays a monetary penalty into the Criminal Forfeiture Fund.

If no one challenges the administrative forfeiture action within 30 days after notification, the department can approve the forfeiture, which results in ownership of the property to be transferred to the State.

The asset forfeiture law includes a few deadlines by which certain actions must be taken. For example, within 30 days after property is seized, police must submit a written request to the prosecutor for forfeiture; prosecutors have 45 days after receipt of the police department's written request for forfeiture in which to initiate forfeiture proceedings against the property; petitions for either remission or mitigation, or claims must be filed by persons claiming an interest in seized property within 30 days after notice by publication or receipt of written notice, whichever is sooner; and the department must issue its written decision on petitions for remission or mitigation within 60 days after receipt of the petition, unless circumstances of the case require additional time. However, the law is silent as to the period of time in which the department must render a decision on an uncontested petition for administrative forfeiture, i.e., one where there is no petition for remission or mitigation.

APPENDIX B

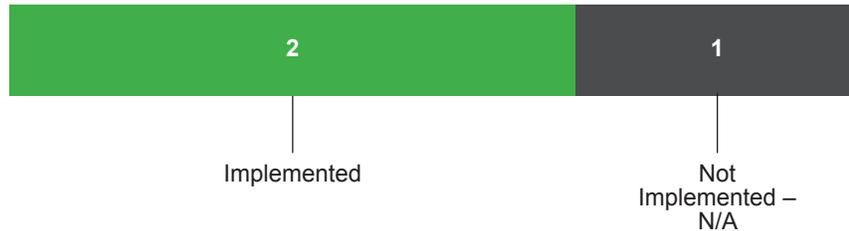
Follow-Up on Recommendations from Report No. 95-22, *Sunset Evaluation of the Forfeiture Program*

This appendix presents the results of our review of three recommendations made to the Legislature in Report No. 95-22, *Sunset Evaluation of the Forfeiture Program*, which was published in October 1995.

Status of Recommendations

Our follow-up efforts were limited to reviewing and reporting on the implementation of the sunset evaluation recommendations. We did not explore new issues or revisit old ones that do not relate to the original recommendations.

Sunset Evaluation Recommendations by Status



Source: Office of the Auditor

Recommendation 1

The Legislature should consider amending Chapter 712A, the Hawai'i Omnibus Criminal Forfeiture Act, by requiring the government in civil judicial forfeiture cases to prove by a "preponderance of the evidence" that the property is subject to forfeiture.

Implemented

Comments

Through Act 104, Session Laws of Hawai'i (SLH) 1996, the Legislature revised Chapter 712A to require the government in civil judicial forfeiture cases, whether in judicial *in rem* proceedings, judicial *in personam* proceedings, or in administrative forfeiture cases removed from the courts at the request of the property claimant, to initially prove by a preponderance of the evidence that the property is subject to forfeiture.

Definition of Terms

WE DEEM recommendations:

Implemented

where the department or agency provided sufficient and appropriate evidence to support all elements of the recommendation;

Partially Implemented

where some evidence was provided but not all elements of the recommendation were addressed;

Not Implemented

where evidence did not support meaningful movement towards implementation, and/or where no evidence was provided;

Not Implemented - N/A

where circumstances changed to make a recommendation not applicable; and

Not Implemented - Disagree

where the department or agency disagreed with the recommendation, did not intend to implement, and no further action will be reported.

Recommendation 2

The Legislature should consider amending Chapter 712A, the Hawai'i Omnibus Criminal Forfeiture Act, by requiring courts to limit the scope of a forfeiture to the extent that they find the effect of the forfeiture grossly disproportionate to the nature and severity of the crime.

Implemented

Comments

Act 104, SLH 1996, also added a new section titled, "Excessive Forfeitures," requiring the courts to limit the scope of a forfeiture to the extent that they find the effect of the forfeiture grossly disproportionate to the nature and severity of the crime.

Recommendation 3

The Legislature should consider amending Chapter 712A, the Hawai'i Omnibus Criminal Forfeiture Act, by repealing the Criminal Forfeiture Fund so that some forfeiture proceeds can be deposited into the State general fund for legislative appropriation.

Not Implemented - N/A

Comments

The Criminal Forfeiture Fund remains in place.

The Legislature passed Act 130, SLH 2013, which revised the criteria for the establishment and continuance of special and revolving funds. Prior to Act 130, the law required a clear nexus between the benefits sought and charges made upon the users or beneficiaries of the program. Act 130 expanded this criterion to include a clear link between the program and sources of revenue.

Our most recent review of the fund in Report No. 14-13, *Report of Special Funds, Revolving Funds, Trust Funds and Trust Accounts of the Departments of the Attorney General and Business, Economic Development and Tourism*, applied the new criterion above, finding that the Criminal Forfeiture Fund continued to serve the purpose for which it was created and met the criteria for a revolving fund.

