

JAN 18 2019

A BILL FOR AN ACT

RELATING TO ASSET FORFEITURE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that state law requires
2 that of the total forfeited property and the sale proceeds
3 thereof collected, twenty-five per cent is distributed to the
4 seizing agency, twenty-five per cent is distributed to the
5 prosecuting attorney, and fifty per cent is deposited into the
6 criminal forfeiture fund, which is a revolving fund that is
7 administered by the department of the attorney general. The
8 attorney general is authorized discretionary use of the moneys
9 from the criminal forfeiture fund to cover various expenses,
10 including those necessary to seize, appraise, maintain,
11 advertise, or sell forfeited property; for awards for
12 information or assistance leading to a civil or criminal
13 proceeding; supplemental payments to state and county agencies
14 for law enforcement purposes; and costs arising in connection
15 with training and education programs for law enforcement
16 officers, enforcement activities of the drug nuisance abatement
17 unit, and the law enforcement officer independent review board.



1 In Report No. 95-22, *Sunset Evaluation of the Forfeiture*
2 *Program*, the auditor recommended that the criminal forfeiture
3 fund be repealed because the fund was not necessary for the
4 asset forfeiture program and repealing the fund would improve
5 accountability and oversight of the expenditures of forfeiture
6 proceeds. The auditor found that the fund failed to reflect a
7 clear link between the benefits sought and charges made upon the
8 users or beneficiaries of the program and instead served as a
9 means to provide the program or users with an automatic means of
10 support that is removed from the normal budget and
11 appropriations process. The criminal forfeiture fund derived
12 its revenues from property forfeited rather than from charges on
13 the law enforcement officers who benefit from the fund.

14 However, in a follow-up of this recommendation under
15 Appendix B of Report No. 18-09, *Audit of the Department of the*
16 *Attorney General's Asset Forfeiture Program*, the auditor found
17 that the recommendation to repeal the criminal forfeiture fund
18 had not been implemented because circumstances changed to make
19 that recommendation not applicable. Specifically, the criteria
20 for the establishment and continuance of revolving funds under
21 section 37-52.4, Hawaii Revised Statutes, were expanded by Act



1 130, Session Laws of Hawaii 2013, to include a clear link
2 between the program and sources of revenue, as an alternative to
3 the benefits sought and charges made nexus requirement.

4 Accordingly, the auditor's *Report No. 14-13, Review of Special*
5 *Funds, Revolving Funds, Trust Funds and Trust Accounts of the*
6 *Departments of the Attorney General and Business, Economic*
7 *Development and Tourism*, applied the new criteria and found that
8 the criminal forfeiture fund continued to serve the purpose for
9 which it was created and met the criteria for a revolving fund.

10 Despite the auditor's finding that the criminal forfeiture
11 fund meets the criteria for continuance under section 37-52.4,
12 Hawaii Revised Statutes, the other reasons to support the
13 recommendation to repeal the fund under Report No. 95-22 are
14 still valid. In that report, the auditor found that depositing
15 money into the general fund would enhance legislative oversight
16 and control over the actual use of the forfeiture funds because
17 the funds would be subject to ordinary appropriation
18 requirements. Furthermore, in Report No. 18-09, the auditor
19 found that the asset forfeiture program was unable to adequately
20 manage its funds because the program lacked basic accounting
21 functions or internal controls. For example, the monthly or



1 quarterly fund balance reports that are essential to facilitate
2 managerial decision-making were not produced; annual program
3 expenditure reports were produced for the sole purpose of
4 reporting to the legislature; and management or other staff
5 failed to review accounting-related data entry or yearly program
6 expenditure reconciliation reports. Without basic accounting
7 functions and proper internal controls in place to properly
8 forecast revenues of and expenditures from the fund, the fund
9 may no longer be self-sustaining, which is a requirement under
10 section 37-52.4, Hawaii Revised Statutes. Therefore, the
11 legislature further finds that legislative oversight will ensure
12 transparency and accountability of the moneys in the criminal
13 forfeiture fund.

14 The purpose of this Act is to improve accountability and
15 oversight of the expenditures of the proceeds from forfeitures
16 by repealing the criminal forfeiture fund and requiring that
17 fifty per cent of the total forfeited property and the sale
18 proceeds thereof collected pursuant to the Hawaii omnibus
19 criminal forfeiture act under chapter 712A, Hawaii Revised
20 Statutes, be deposited into the general fund instead.



1 SECTION 2. Section 712A-10, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "§712A-10 Administrative forfeiture. The prosecuting
4 attorney may initiate administrative forfeiture of property
5 other than real property, the estimated value of which is less
6 than \$100,000, or of any vehicle or conveyance, regardless of
7 value. Administrative forfeiture shall be processed in the
8 following manner:

9 [~~1~~] (a) The prosecuting attorney shall file a petition
10 with the attorney general, pursuant to rules adopted
11 by the attorney general~~[-]~~;

12 [~~2~~] (b) The prosecuting attorney shall give notice of
13 pending forfeiture by making reasonable efforts to
14 serve a copy of the petition in a manner provided in
15 section 712A-8(a) or 712A-8(b) on all persons known to
16 have an interest in the property, together with
17 instructions for filing a claim and cost or in
18 pauperis bond, or a petition for remission or
19 mitigation~~[-]~~;

20 [~~3~~] (c) The attorney general shall give notice of
21 intention to forfeit the property administratively by



1 publication in the manner provided in section
2 712A-8(c). Notice by publication shall include:

- 3 ~~[(a)]~~ (i) A description of the property;
- 4 ~~[(b)]~~ (ii) The estimated value of the property;
- 5 ~~[(c)]~~ (iii) The date and place of the seizure;
- 6 ~~[(d)]~~ (iv) The offense for which the property is
7 subject to forfeiture;
- 8 ~~[(e)]~~ (v) Instructions for filing a claim and cost or
9 in pauperis bond, or a petition for remission or
10 mitigation; and
- 11 ~~[(f)]~~ (vi) Notice that the property will be forfeited
12 to the State if a claim and cost or in pauperis
13 bond or petition for remission or mitigation is
14 not filed in substantial compliance with this
15 section~~[-]~~;

16 ~~[(4)]~~ (d) Persons claiming an interest in the property may
17 file either a petition for remission or mitigation of
18 forfeiture, or a claim and cost or in pauperis bond,
19 but not both, with the attorney general, within thirty
20 days of notice by publication or receipt of written
21 notice, whichever is earlier. Notwithstanding section



1 1-29, the thirty-day time period prescribed [~~herein~~]
2 is computed by excluding the first day and including
3 the last day, unless the last day is a Saturday,
4 Sunday, or holiday and then it is also excluded, and
5 the thirty-day time period runs until the end of the
6 next day [~~which~~] that is not a Saturday, Sunday, or a
7 holiday. "Holiday" includes any day designated as a
8 holiday pursuant to section 8-1[~~-~~];

9 [~~+5~~] (e) Any person claiming seized property may seek
10 remission or mitigation of the forfeiture by timely
11 filing a petition with the attorney general. A
12 petition for remission or mitigation shall not be used
13 to challenge the sufficiency of the evidence to
14 support the forfeiture or the actions of any
15 government official, but shall presume a valid
16 forfeiture and ask the attorney general to invoke the
17 executive power to pardon the property, in whole or in
18 part. The petition shall be signed by the petitioner
19 and sworn on oath before a notary public and shall
20 contain the following:



1 ~~[(a)]~~ (i) A reasonably complete description of the
2 property;

3 ~~[(b)]~~ (ii) A statement of the interest of the
4 petitioner in the property, as owner or interest-
5 holder, which may be supported by bills of sale,
6 contracts, or mortgages, or other documentary
7 evidence; and

8 ~~[(c)]~~ (iii) Facts and circumstances sufficient to show
9 whether the petitioner:

10 ~~[(i)]~~ (A) Owns or holds an interest in the seized
11 property as defined by section 712A-1;

12 ~~[(ii)]~~ (B) Had any knowledge that the property was
13 or would be involved in any violation of the
14 law;

15 ~~[(iii)]~~ (C) Had any knowledge of the particular
16 violation ~~[which]~~ that subjected the
17 property to seizure and forfeiture; and

18 ~~[(iv)]~~ (D) Had any knowledge that the user of the
19 property had any record, including arrests,
20 except when the person was acquitted or the
21 charges dismissed due to lack of evidence,



1 for the violation [~~which~~] that subjected the
2 property to seizure and forfeiture or for
3 any crime [~~which~~] that is similar in nature.

4 Any subsequent pleadings or written communications
5 alleging matters pertaining to [~~+~~] subparagraph [~~+~~]~~(b)~~
6 ~~or (c) of this [paragraph]] must~~ (ii) or (iii) shall
7 also be signed by the petitioner and sworn on oath
8 before a notary public[~~-~~];

9 [~~6~~] (f) If the attorney general, with sole discretion,
10 determines that remission is not warranted, the
11 attorney general may discretionarily mitigate the
12 forfeiture where the petitioner has not met the
13 minimum requirements for remission but where there are
14 present other extenuating circumstances indicating
15 that some relief should be granted to avoid extreme
16 hardship. Mitigation may also be granted where the
17 minimum requirements for remission have been met, but
18 the overall circumstances are such that the attorney
19 general determines that complete relief is not
20 warranted. Mitigation shall take the form of a money
21 penalty imposed upon the petitioner [~~which~~] that shall



1 be deposited into the [~~eriminal forfeiture~~] general
2 fund [~~established under~~] pursuant to section 712A-16.

3 Extenuating circumstances include:

4 [~~(a)~~] (i) Language or culture barrier;

5 [~~(b)~~] (ii) Humanitarian factors, such as youth or
6 extreme age;

7 [~~(c)~~] (iii) Presence of physical or mental disease,
8 disorder, or defect;

9 [~~(d)~~] (iv) Limited or peripheral criminal culpability;

10 [~~(e)~~] (v) Cooperation with the seizing agency or the
11 prosecuting attorney; and

12 [~~(f)~~] (vi) Any contributory error on the part of
13 government officials~~[-]~~;

14 [~~(7)~~] (g) It shall be the duty of the attorney general to
15 inquire into the facts and circumstances alleged in a
16 petition for remission or mitigation of forfeiture.

17 However, no petitioner is entitled to a hearing on the
18 petition for remission or mitigation. Hearings, if
19 any, shall be held at the discretion of the attorney
20 general~~[-]~~;



1 ~~[(8)]~~ (h) The attorney general shall provide the seizing
2 agency and the petitioner a written decision on each
3 petition for remission or mitigation within sixty days
4 of receipt of the petition unless the circumstances of
5 the case require additional time, in which case the
6 attorney general shall notify the petitioner in
7 writing and with specificity within the sixty-day
8 period that the circumstances of the case require
9 additional time and further notify the petitioner of
10 the expected decision date~~[-]~~;

11 ~~[(9)]~~ (i) Any person claiming seized property may seek
12 judicial review of the seizure and proposed forfeiture
13 by timely filing with the attorney general a claim and
14 bond to the State in the amount of ten per cent of the
15 estimated value of the property or in the sum of
16 \$2,500, whichever is greater, with sureties to be
17 approved by the attorney general, upon the condition
18 that if the claimant fails to prove that claimant's
19 interest is exempt from forfeiture under section 712A-
20 5, the claimant shall pay the State's costs and
21 expenses, including reasonable attorneys fees incurred



1 in connection with a judicial proceeding. In lieu of
2 a cost bond, a claimant may file an in pauperis bond
3 sworn on oath before a notary public. An in pauperis
4 bond shall be in the form set out in the appendix to
5 the rules of penal procedure. The claim shall be
6 signed by the claimant and sworn on oath before a
7 notary public and shall comply with the requirements
8 of section 712A-12(5). Upon receipt of the claim and
9 bond, the attorney general shall notify the
10 prosecuting attorney who may discretionarily continue
11 to seek forfeiture by petitioning the circuit court
12 for forfeiture of the property within forty-five days
13 of receipt of notice that a proper claim and bond has
14 been filed. The prosecuting attorney may also elect
15 to honor the claim in which case the prosecuting
16 attorney shall notify the seizing agency and authorize
17 the release of the seizure for forfeiture on the
18 property or on any specified interest in it~~[-]~~i;

19 ~~[-10]~~ (j) If a judicial forfeiture proceeding is instituted
20 subsequent to notice of administrative forfeiture
21 pursuant to paragraph ~~[-9]~~7 (i), no duplicate or



1 repetitive notice shall be required. The judicial
2 proceeding, if any, shall adjudicate all timely filed
3 claims. At the judicial proceeding, the claimant may
4 testify, present evidence and witnesses on the
5 claimant's behalf, and cross-examine witnesses who
6 appear at the hearing. The State may present evidence
7 and witnesses in rebuttal and in defense of its claim
8 to the property and cross-examine witnesses who appear
9 at the hearing. The State has the initial burden of
10 showing by a preponderance of the evidence that the
11 claimant's interest in the property is subject to
12 forfeiture. On such a showing by the State, the
13 claimant has the burden of showing by a preponderance
14 of the evidence that the claimant's interest in the
15 property is not subject to forfeiture[-];

16 [~~(11)~~] (k) In the event a claim and bond [~~has~~] have not been
17 filed in substantial compliance with this section, or
18 if the attorney general, with sole discretion,
19 determines that remission or mitigation is not
20 warranted, the attorney general shall order forfeited
21 all property seized for forfeiture. In the event the



1 attorney general, with sole discretion, determines
 2 that remission or mitigation is warranted, the
 3 attorney general shall notify the seizing agency and
 4 the prosecuting attorney and order the release of the
 5 seizure for forfeiture on the property or on any
 6 specified interest in it. There shall be no appeal
 7 from the attorney general's decision or order of
 8 forfeiture or remission or mitigation[-]; and

9 ~~[-(12)-]~~ (1) Administrative proceedings and the adoption of
 10 rules under this section are exempt from the
 11 requirements of chapter 91, the Hawaii administrative
 12 procedure act, and are adjudicatory functions for the
 13 purposes of applicable sections of the Hawaii Revised
 14 Statutes."

15 SECTION 3. Section 712A-16, Hawaii Revised Statutes, is
 16 amended to read as follows:

17 "**§712A-16 Disposition of property forfeited.** (1) All
 18 property forfeited to the State under this chapter shall be
 19 transferred to the attorney general who:

- 20 (a) May transfer property, other than currency, which
- 21 shall be distributed in accordance with subsection (2)



1 to any local or state government entity, municipality,
2 or law enforcement agency within the State;

3 (b) May sell forfeited property to the public by public
4 sale; provided that for leasehold real property:

5 (i) The attorney general shall first offer the holder
6 of the immediate reversionary interest the right
7 to acquire the leasehold interest and any
8 improvements built or paid for by the lessee for
9 the then fair market value of the leasehold
10 interest and improvements. The holder of the
11 immediate reversionary interest shall have thirty
12 days after receiving written notice within which
13 to accept or reject the offer in writing;
14 provided that the offer shall be deemed to be
15 rejected if the holder of the immediate
16 reversionary interest has not communicated
17 acceptance to the attorney general within the
18 thirty-day period. The holder of the immediate
19 reversionary interest shall have thirty days
20 after acceptance to tender to the attorney
21 general the purchase price for the leasehold



1 interest and any improvements, upon which tender
2 the leasehold interest and improvements shall be
3 conveyed to the holder of the immediate
4 reversionary interest[-];

5 (ii) If the holder of the immediate reversionary
6 interest fails to exercise the right of first
7 refusal provided in subparagraph (i), the
8 attorney general may proceed to sell the
9 leasehold interest and any improvements by public
10 sale[-]; and

11 (iii) Any dispute between the attorney general and the
12 holder of the immediate reversionary interest as
13 to the fair market value of the leasehold
14 interest and improvements shall be settled by
15 arbitration pursuant to chapter 658A;

16 (c) May sell or destroy all raw materials, products, and
17 equipment of any kind used or intended for use in
18 manufacturing, compounding, or processing a controlled
19 substance or any untaxed cigarettes in violation of
20 chapter 245;



1 (d) May compromise and pay valid claims against property
2 forfeited pursuant to this chapter; or

3 (e) May make any other disposition of forfeited property
4 authorized by law.

5 (2) All forfeited property and the sale proceeds thereof,
6 ~~[up to a maximum of three million dollars per year,]~~ not
7 previously transferred pursuant to ~~[+]subsection[+]~~ (1)(a) ~~[of~~
8 ~~this section]~~, shall, after payment of expenses of
9 administration and sale, be distributed as follows:

10 (a) One quarter shall be distributed to the unit or units
11 of state or local government ~~[+]whose[+]~~ officers or
12 employees conducted the investigation and caused the
13 arrest of the person whose property was forfeited or
14 seizure of the property for forfeiture;

15 (b) One quarter shall be distributed to the prosecuting
16 attorney who instituted the action producing the
17 forfeiture; and

18 (c) One half shall be deposited into the ~~[eriminal~~
19 ~~forfeiture fund established by this chapter.]~~ general
20 fund.



1 (3) Property and money distributed to units of state and
2 local government shall be used for law enforcement purposes, and
3 shall complement, but not supplant, the funds regularly
4 appropriated for such purposes.

5 (4) ~~[There is established in the department of the~~
6 ~~attorney general a revolving fund to be known as the criminal~~
7 ~~forfeiture fund, hereinafter referred to as the "fund" in which~~
8 ~~shall be deposited one half of the proceeds of a forfeiture and~~
9 ~~any penalties paid pursuant to section 712A-10(6).]~~ All moneys
10 ~~[in the fund]~~ deposited into the general fund pursuant to
11 subsection (2)(c) and any penalties paid pursuant to section
12 712A-10(f) shall be ~~[expended by the attorney general and are]~~
13 appropriated for the following purposes:

14 (a) The payment of any expenses necessary to seize,
15 detain, appraise, inventory, safeguard, maintain,
16 advertise, or sell property seized, detained, or
17 forfeited pursuant to this chapter or of any other
18 necessary expenses incident to the seizure, detention,
19 or forfeiture of such property and such contract
20 services and payments to reimburse any federal, state,

1 or county agency for any expenditures made to perform
2 the foregoing functions;

3 (b) The payment of awards for information or assistance
4 leading to a civil or criminal proceeding;

5 (c) The payment of supplemental sums to state and county
6 agencies for law enforcement purposes;

7 (d) The payment of expenses arising in connection with
8 programs for training and education of law enforcement
9 officers;

10 (e) The payment of expenses arising in connection with
11 enforcement pursuant to the drug nuisance abatement
12 unit in the department of the attorney general; and

13 (f) The payment of expenses arising in connection with the
14 law enforcement officer independent review board in
15 the department of the attorney general.

16 (5) The attorney general may, without regard to the
17 requirements of chapter 91, [~~promulgate~~] adopt rules [~~and~~
18 ~~regulations~~] concerning the disposition of property, the use of
19 the [~~fund,~~] moneys appropriated in accordance with subsection
20 (4), and compromising and paying valid claims against property
21 forfeited pursuant to this chapter.



1 (6) ~~[Not]~~ No less than twenty days prior to the convening
2 of each regular session, the attorney general shall provide to
3 the legislature a report on the use of the Hawaii omnibus
4 criminal forfeiture act during the fiscal year preceding the
5 legislative session. The report shall include:

6 (a) The total amount and type of property seized by law
7 enforcement agencies;

8 (b) The total number of administrative and judicial
9 actions filed by prosecuting attorneys and the
10 disposition thereof;

11 (c) The total number of claims or petitions for remission
12 or mitigation filed in administrative actions and the
13 dispositions thereof;

14 (d) The total amount and type of property forfeited and
15 the sale proceeds thereof;

16 (e) The total amount and type of property distributed to
17 units of state and local government;

18 (f) The amount of money deposited into the ~~[criminal~~
19 ~~forfeiture]~~ general fund ~~[,]~~ pursuant to subsection
20 (2)(c) and any penalties paid pursuant to section
21 712A-10(f); and



1 (g) The amount of money expended by the attorney general
 2 from any appropriation from the [eriminal forfeiture]
 3 general fund under subsection ~~[(+5)]~~ (4) and the reason
 4 for the expenditures."

5 SECTION 4. This Act does not affect rights and duties that
 6 matured, penalties that were incurred, and proceedings that were
 7 begun before its effective date.

8 SECTION 5. Statutory material to be repealed is bracketed
 9 and stricken. New statutory material is underscored.

10 SECTION 6. This Act shall take effect upon its approval;
 11 provided that the amendments made to section 712A-16, Hawaii
 12 Revised Statutes, by section 3 of this Act shall not be repealed
 13 when that section is reenacted on June 30, 2022, pursuant to
 14 section 7(3) of Act 161, Session Laws of Hawaii 2016.

INTRODUCED BY:

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S.B. NO. 246

Report Title:

Forfeiture; Disposition of Forfeited Property; Criminal Forfeiture Fund; Department of the Attorney General

Description:

Repeals the criminal forfeiture fund and requires fifty per cent of the total forfeited property and the sale proceeds thereof collected pursuant to state forfeiture laws to be deposited into the general fund.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

