

DAVID Y. IGE
GOVERNOR



DEPT. COMM. NO. 184

DOUGLAS S. CHIN
ATTORNEY GENERAL

RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

December 28, 2017

The Honorable Ronald D. Kouchi
President of the Senate
and Members of the Senate
Twenty-Ninth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

The Honorable Scott K. Saiki
Speaker and Members of the House of
Representatives
Twenty-Ninth State Legislature
State Capitol, Room 431
Honolulu, Hawaii 96813

Dear President Kouchi and Speaker Saiki:

For your information and consideration, I am transmitting one (1) copy for each of you of the Department of the Attorney General's Annual Report of Proceedings under the Hawaii Omnibus Criminal Forfeiture Act, as required by section 712A-16(b), Hawaii Revised Statutes (HRS). In accordance with Section 93-16, HRS, I am also informing you that the report may be viewed electronically at <http://ag.hawaii.gov/publications/reports/reports-to-the-legislature/>.

If you have any questions or concerns, please feel free to call me at 586-1282.

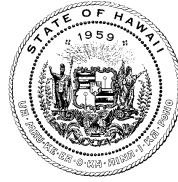
Sincerely,

Douglas S. Chin
Attorney General

c: David Y. Ige, Governor
Shan S. Tsutsui, Lieutenant Governor
Legislative Reference Bureau (Attn.: Karen Mau)
Leslie Kondo, State Auditor
Wesley K. Machida, Director of Finance, Department of Budget and Finance
Stacey Aldrich, State Librarian, Hawaii State Public Library System
David Lassner, PhD., President, University of Hawaii

Enclosure

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ANNUAL REPORT OF PROCEEDINGS UNDER THE HAWAII OMNIBUS CRIMINAL FORFEITURE ACT

Fiscal Year 2016-2017

Submitted to the Twenty-Ninth State Legislature
Regular Session of 2018

I. INTRODUCTION

In 1988, the Legislature enacted chapter 712A, Hawaii Revised Statutes (HRS), the Hawaii Omnibus Criminal Forfeiture Act. Chapter 712A provides for the forfeiture of property used or acquired in connection with the commission of certain criminal offenses and for the distribution of the property, or its proceeds, to law enforcement agencies for law enforcement purposes. Pursuant to section 712A-10, HRS, the Department of the Attorney General processes petitions for administrative forfeiture of personal property valued at less than \$100,000, or of any vehicle or conveyance regardless of value, but does not handle forfeiture of real property. A prosecuting attorney commences judicial forfeiture proceedings concerning real property or personal property valued at more than \$100,000 by filing a petition for forfeiture in the circuit court. In a case initiated as an administrative forfeiture, a person who owns or otherwise has a legal interest in seized property can obtain judicial review of a case by timely filing a claim and bond with the Attorney General.

Pursuant to section 712A-16, HRS, the Attorney General distributes administratively or judicially forfeited property, and the sale proceeds thereof, to law enforcement agencies and other local or state government entities for law enforcement purposes. Forfeited currency and the proceeds of sales of forfeited property are distributed according to a specific formula. The agency that seized the property and the prosecutor that filed the petition each receive a 25 percent share. The remaining 50 percent is deposited into the Criminal Forfeiture Fund administered by the Attorney General. The Attorney General expends moneys from the Criminal Forfeiture Fund to defray administrative expenses incurred in processing forfeiture cases, to maintain and store seized property, to train law enforcement officers, to provide grants to law

enforcement agencies, or to accomplish other purposes more specifically outlined in section 712A-16(4), HRS.

Section 712A-16(6), HRS, requires the Attorney General to report to the Legislature “on the use of the Hawaii omnibus criminal forfeiture act during the fiscal year preceding the legislative session.” Section 712A-16(6) requires the report to include the following information:

- (a) The total amount and type of property seized by law enforcement agencies;
- (b) The total number of administrative and judicial actions filed by prosecuting attorneys and the disposition thereof;
- (c) The total number of claims or petitions for remission or mitigation filed in administrative actions and the dispositions thereof;
- (d) The total amount and type of property forfeited and the sale proceeds thereof;
- (e) The total amount and type of property distributed to units of state and local government;
- (f) The amount of money deposited into the criminal forfeiture fund; and
- (g) The amount of money expended by the Attorney General from the criminal forfeiture fund and the reason for the expenditures.

II. HISTORY OF ASSET FORFEITURE

Forfeiture has been used since ancient times to take property wrongfully used or acquired. References to forfeiture in the Old Testament and in Greek and Roman law indicate that its purpose was to exact a penalty against property which had been used or acquired in connection with some type of prohibited conduct. In modern times, forfeiture is used to protect the public from harmful products and the property of criminal enterprise.¹

The first statute authorizing civil forfeiture was enacted by Congress in 1789 as a sanction for the use of ships in customs violations.² In 1978, Congress expanded the law to permit forfeiture of all money used in or acquired from the illegal drug trade,³ and authorized the forfeiture of real property in 1984.⁴ Federal civil and criminal forfeiture statutes now reach substantially the same offenses and types of property. All fifty states and the District of Columbia now have some type of civil and/or criminal forfeiture statute in effect.⁵

As a result, criminals are deprived of their working capital and profits, thereby preventing them from operating even where traditional criminal sanctions have not

¹ U.S. Department of Justice, Drug Enforcement Administration, Drug Agents Guide to Forfeiture of Assets 3 (1987 Revision and Supp. 1990).

² Act of July 31, 1789, sections 12, 36; 1 Stat. 39, 47.

³ 21 U.S.C. section 881(a)(6).

⁴ 21 U.S.C. section 853.

⁵ National Criminal Justice Association, Asset Seizure & Forfeiture: Developing and Maintaining A State Capability, App. A (1988).

otherwise deterred them. A secondary benefit of forfeiture laws is that forfeited property, or the proceeds of its sale, is turned over to law enforcement and used to fight crime. While the purpose of forfeiture and the evaluation of a forfeiture law or program should never be based solely on the generation of revenue, it is fitting that forfeited property be used to combat those who seek to profit from crime.

III. ASSET FORFEITURE UNDER STATE LAW

In 1988, a law enforcement coalition consisting of the Attorney General and the four county prosecutors and police chiefs proposed that a new, uniform forfeiture law be enacted. This effort is now codified as chapter 712A, HRS, and represents a combination of federal forfeiture law, the forfeiture act adopted by the State of Arizona in 1986, and the provisions of Hawaii's various laws relating to forfeiture. The purpose was to create a law that would be both procedurally and substantively comprehensive and, to the extent possible, uniform across the State.

Chapter 712A provides for administrative forfeitures and judicial forfeitures against individuals and property. Chapter 712A also provides for forfeitures of substitute assets from convicted criminals where the assets originally subject to forfeiture have been secreted or otherwise dissipated or disposed of. Chapter 712A also significantly expands the number and kinds of offenses that give rise to forfeiture. At the same time, it provides explicit procedural and substantive rights to claimants, especially innocent owners. The Legislature placed a ceiling of \$3,000,000 per year on the amount of forfeited property that could be retained by law enforcement, with any excess going into the state general fund.

Distribution of forfeited property up to the ceiling is administered by the Attorney General according to the criteria of section 712A-16, HRS. In 1990, the Legislature amended chapter 712A to require an annual report on its use and the disposition of property forfeited pursuant to it. In 1996, the Legislature further amended chapter 712A and made the state forfeiture law permanent.

IV. ADMINISTRATIVE FORFEITURE

Perhaps the most important advantage afforded by chapter 712A is a provision by which forfeiture of personal property worth less than \$100,000, or forfeiture of any vehicle or conveyance, regardless of value, is administratively processed. Previously, all forfeitures were handled through judicial proceedings, resulting in the consumption of judicial resources even where the forfeiture was uncontested.

Under section 712A-10, HRS, a prosecuting attorney files a petition for administrative forfeiture of seized property with the Department of the Attorney General. Persons who own or otherwise have an interest in seized property ("claimants"), have thirty days to respond from the date they receive notice of the pending forfeiture by publication, personal service, or mail, whichever occurs first. Claimants may file a Petition for Remission or Mitigation of Forfeiture, which does not challenge the sufficiency of evidence supporting the forfeiture or the actions of any government official. Instead, the petitioner asks the Attorney General to invoke the executive power to "pardon" the

property, in whole or in part, because of extenuating or mitigating circumstances not otherwise amounting to a legal defense to forfeiture. Depending on the circumstances, the Attorney General may pardon the property in its entirety and “remit” (return) it to the claimants or “mitigate” the forfeiture by returning the property on payment of a fine.

Alternatively, the claimant can file a claim that asserts under oath that the property is not subject to forfeiture and that requests that the forfeiture be removed to court for judicial review. Except for persons who are indigent, claimants must also post a cost bond equal to 10 percent of the estimated value of the seized property or \$2,500, whichever is greater. The purpose of the cost bond is to ensure that, if the claimant frivolously removes the forfeiture action to court, expenses incurred by the State in judicially prosecuting the forfeiture will be borne by the claimant, with the bond serving as security.

Finally, the claimant may do nothing, in which case forfeiture is ordered after expiration of thirty days.

By these means, forfeiture proceedings can be disposed of administratively without unnecessary consumption of valuable judicial resources while still providing those who want their “day in court” the opportunity to challenge the forfeiture.

V. DISTRIBUTION OF PROCEEDS

Once property has been forfeited to the State through administrative or judicial proceedings, the Attorney General is charged with disposing of it pursuant to section 712A-16, HRS. Pursuant to section 712A-16(1), HRS, the Attorney General may transfer forfeited property, such as automobiles, to state and county agencies; sell property by public sale; pay valid claims against forfeited property; and destroy contraband or raw materials or equipment used to manufacture controlled substances.

Pursuant to section 712A-16(2), HRS, the Attorney General distributes a 25 percent share of forfeited currency and sale proceeds of forfeited property, if any, to both the agency that seized the property and the prosecuting attorney that initiated the administrative or judicial forfeiture proceeding. The remaining 50 percent of the forfeited currency, or sale proceeds, if any, is deposited into the Criminal Forfeiture Fund, which is administered by the Attorney General. Pursuant to section 712A-16(4), HRS, the Department of the Attorney General distributes money from the Criminal Forfeiture Fund to law enforcement agencies and prosecuting attorneys as requests are made.

Property and money distributed pursuant to section 712A-16, HRS, must be used for law enforcement purposes and may be used to supplement, but not supplant, funds regularly appropriated to law enforcement agencies. For example, strong emphasis has been placed on spending money from the Criminal Forfeiture Fund to meet the training and education needs of law enforcement personnel.

VI. ASSET FORFEITURE: FY 2016-2017

1. Total amount of property seized by law enforcement agencies

ESTIMATED VALUE⁶ OF SEIZURES FOR FORFEITURE⁷ IN FY 2016-2017
(BY SEIZING AGENCY)

<u>Seizing Agency</u>	<u>Currency</u>	<u>Vehicles</u>	<u>Misc. Property</u>	<u>Total</u>	<u>Percentage</u>
Hawaii County Police Dept.	\$334,087	\$71,459	\$18,662	\$424,208	61.50%
Honolulu Police Dept.	\$63,570	\$64,500	\$2,850	\$130,920	19.00%
Maui County Police Dept.	\$46,850	\$18,856	\$0	\$65,706	9.50%
Kauai County Police Dept.	<u>\$12,123</u>	<u>\$56,767</u>	<u>\$0</u>	<u>\$68,890</u>	<u>10.00%</u>
TOTAL	<u>\$456,630</u>	<u>\$211,582</u>	<u>\$21,512</u>	<u>\$689,724</u>	<u>100.00%</u>

ESTIMATED VALUE OF SEIZURES FOR FORFEITURE IN FY 2016-2017
(BY TYPE OF PROPERTY)

<u>Type of Property</u>	<u>Estimated Value</u>	<u>Percentage</u>
Vehicles	\$211,582	30.70%
Currency	\$456,630	66.20%
Miscellaneous Property	<u>\$21,512</u>	<u>3.10%</u>
TOTAL	<u>\$689,724</u>	<u>100.00%</u>

2. Total number of administrative and judicial actions filed by prosecuting attorneys and the disposition thereof

In fiscal year 2016-2017, prosecuting attorneys⁸ filed 70 petitions for administrative forfeiture with the Department of the Attorney General. Of the 70

⁶ Forfeited property, including contraband, is given an estimated value by the seizing agency. The sales proceeds of a particular forfeited property may not equal its estimated value. The total estimated value of seizures for forfeiture includes contraband (such as untaxed tobacco, firearms, and gambling machines) and property found to be unsafe or in poor condition that is eventually destroyed.

⁷ "Seizure for forfeiture" means seizure of property by a law enforcement officer coupled with an assertion by the seizing agency or by a prosecuting attorney that the property is subject to forfeiture. Section 712A-1, HRS.

⁸ "Prosecuting attorney" means the prosecuting attorney or deputy prosecuting attorneys of the various counties, or the Attorney General or deputy attorneys general when engaged in the prosecution of a criminal offense. Section 712A-1, HRS.

petitions, 42 were adjudicated and a final order was issued by the Department; 17 were dismissed with or without prejudice; 1 was voluntarily withdrawn by the prosecuting attorney; and at the end of the fiscal year, 10 were pending service, publication, statutory deadlines, outcome of judicial claim, or decision on petition for remission or mitigation,⁹ or had just been filed.

In fiscal year 2016-2017, the Department of the Attorney General processed a total of 94 cases. Of the 94 cases, 42 were filed in fiscal year 2016-2017, and 52 were pending cases from previous fiscal years. Of the 94 cases, 66 involved uncontested forfeiture (persons with an interest in the property did not respond to the notice of pending forfeiture), 23 involved petitions for remission or mitigation; 4 involved judicial proceedings; and 1 was voluntarily withdrawn by the prosecuting attorney.

3. Total number of claims or petitions for remission or mitigation filed in administrative actions and the dispositions thereof

In fiscal year 2016-2017, 5 claims seeking judicial review of the seizure were filed in administrative forfeiture actions. These claims were referred to the respective prosecuting attorneys to determine whether, pursuant to section 712A-10(9), HRS, the claim should be honored or the forfeiture action should be brought to court for judicial resolution. At the close of fiscal year 2016-2017, 4 of these claims had been settled with the approval of the court or the Attorney General or voluntarily withdrawn by the prosecuting attorney, and 1 was still in litigation.

In fiscal year 2016-2017, 7 petitions for remission or mitigation were filed. At the close of the fiscal year, 6 of these petitions had been resolved and 1 was pending inquiry by the Department of the Attorney General pursuant to section 712A-10(6) and (7), HRS.

⁹ A petition for remission or mitigation of forfeiture does not challenge the sufficiency of the evidence supporting the forfeiture or the actions of any government official. Instead, the petitioner asks the Attorney General to invoke the executive power to “pardon” the property, in whole or in part, because of extenuating or mitigating circumstances not otherwise amounting to a legal defense to forfeiture. Depending on the circumstances, the Attorney General may pardon the property in its entirety and “remit” (return) it to the claimants or “mitigate” the forfeiture by returning the property on payment of a fine.

4. Total amount and type of property forfeited and the sale proceeds thereof

ESTIMATED VALUE OF FORFEITURES ORDERED IN FY 2016-2017

<u>Seizing Agency</u>	<u>Currency</u>	<u>Vehicles</u>	<u>Misc. Property</u>	<u>Total</u>	<u>Percentage</u>
Hawaii County Police Department	\$228,464	\$62,063	\$21,540	\$312,067	66 %
Honolulu Police Department	\$35,144	\$30,700	\$3,358	\$69,202	15 %
Maui County Police Department	\$33,124	\$0	\$0	\$33,124	7 %
Kauai County Police Department	\$21,383	\$34,785	\$0	\$56,168	12%
TOTAL	<u>\$318,115</u>	<u>\$127,548</u>	<u>\$24,898</u>	<u>\$470,561</u>	<u>100 %</u>

A portion of the above-ordered forfeited vehicles and miscellaneous property was sold at public auctions.¹⁰

<u>Date of Auction</u>	<u>Net Proceeds</u>
December 17, 2016	\$15,780.50
June 17, 2017	<u>\$36,987.03</u>
Total	<u>\$52,767.53</u>

5. Total amount and type of property distributed to units of state and local government

Pursuant to the formula set forth in section 712A-16(2)(a) and (b), \$165,123.16 in forfeited currency and auction proceeds were distributed to the Honolulu, Kauai, Maui, and Hawaii County Police Departments and Prosecuting Attorneys' offices. Forfeited property other than currency, including vehicles, with an estimated total value of \$10,000.00 was transferred to the Honolulu Police Department.

6. Amount of money deposited into the criminal forfeiture fund

Pursuant to the formula set forth in section 712A-16(2)(c), \$255,118.60 was deposited into the Criminal Forfeiture Fund.

¹⁰ Contraband (including untaxed tobacco, firearms, and gambling machines) and property found to be unsafe or in poor condition may be destroyed and not auctioned.

7. Amount of money expended by the Attorney General from the Criminal Forfeiture Fund and the reason for the expenditures

<u>Purpose</u>	<u>Amount</u>	<u>Explanatory Notes</u>
Training	\$ 8,269.20	American Polygraph Seminar, Cellebrite Certified Logical Operator, and Certified Physical Analyst Course, Heroin, Fentanyl, and Opioid Seminar.
Equipment	\$ 42,130.63	13 Dell Latitude E-5570 laptop computers, docking stations and top load cases, 2 Smart SMB685 Touchboards, "Simunition" Force on Force training equipment, Camtasia Video Capture Software, Talino KA-L and other computer related hardware.
Mailing Expense (reimbursement)	\$ 948.41	Reimbursement for mailing expenses
Newspaper Publication of Legal Notice	\$ 10,450.34	Notice of pending forfeiture
Warehouse Upkeep/Storage of Forfeited Assets	\$ 3,069.94	Alarm system operation and utilities; towing of vehicles; equipment; real property upkeep
Auction Expenditures	\$ 9,130.87	Automotive repair and parts; overtime payments; shipping and towing of vehicles; auctioneer services
Payroll Expenditures for the Asset Forfeiture Unit	\$ 263,692.41	Asset Forfeiture Program manager, legal assistant and secretary salaries; related payroll taxes
Other Operating Expenditures	\$ 1,836.13	Phone charges; office supplies; petty cash replenishment
Return	<u>\$ 383.00</u>	(99-16110) Sonny Westbrook
TOTAL:	<u>\$ 339,910.93</u>	