

DAVID Y. IGE
GOVERNOR



CLARE E. CONNORS
ATTORNEY GENERAL

DANA O. VIOLA
FIRST DEPUTY ATTORNEY GENERAL

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

December 22, 2020

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

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

Dear President Kouchi, Speaker Saiki, and Members of the Legislature:

For your information and consideration, I am transmitting a copy of the Department of the Attorney General's Annual Report on Proceedings Under the Hawaii Omnibus Criminal Forfeiture Act, as required by section 712A-16(6), 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 586-1500.

Sincerely,

A handwritten signature in blue ink, appearing to be "Clare E. Connors", with a long horizontal stroke extending to the right.

Clare E. Connors
Attorney General

c: David Y. Ige, Governor
Josh Green, Lieutenant Governor
Legislative Reference Bureau (Attn.: Karen Mau)
Leslie H. Kondo, State Auditor
Craig K. Hirai, Director of Finance, Department of Budget and Finance
Stacey A. Aldrich, State Librarian, Hawaii State Public Library System
David Lassner, PhD., President, University of Hawaii

Enclosure

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ANNUAL REPORT ON PROCEEDINGS UNDER THE HAWAII OMNIBUS CRIMINAL FORFEITURE ACT

Pursuant to Section 712A-16(6), Hawaii Revised Statutes

Fiscal Year 2020

Submitted to the Thirty-First State Legislature
Regular Session of 2020

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 the distribution of the property, or its proceeds, to law enforcement agencies for law enforcement purposes. The Prosecuting Attorney may initiate administrative forfeiture of property by filing a petition with the Attorney General pursuant to section 712A-10, HRS, or may initiate judicial in rem forfeiture proceedings concerning real property, or personal property valued at more than \$100,000, by filing a petition for forfeiture in the circuit court pursuant to section 712A-12, HRS. The Attorney General processes petitions for administrative forfeiture of personal property valued at less than \$100,000 or any vehicle or conveyance regardless of value. In a case initiated as an administrative forfeiture, a person who owns or otherwise has a legal interest in seized property may file a petition for remission or mitigation with the Attorney General or choose to pursue judicial resolution of a case by timely filing a claim and bond with the Attorney General who shall notify the Prosecuting Attorney who may continue to seek forfeiture by petitioning the circuit court.

All property forfeited to the State pursuant to chapter 712A, HRS, is transferred to the Attorney General, who may transfer, sell, pay claims with, or make any other disposition of the forfeited property authorized by law, pursuant to section 712A-16(1), HRS. All forfeited property and the sale proceeds thereof, after costs, up to three million dollars per year, that are not previously transferred pursuant to 712A-16(1), shall be distributed to law enforcement agencies pursuant to section 712A-16(2) and shall be

used 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 twenty-five per cent share. The remaining fifty per cent is deposited into the criminal forfeiture fund established by section 712A-16(4), HRS, and administered by the Attorney General. The Attorney General expends moneys from the criminal forfeiture fund for purposes including to defray administrative expenses incurred in processing forfeiture cases; to maintain and store seized property; and to provide grants to law enforcement agencies for law enforcement purposes pursuant to 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." The report shall 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 under subsection 712A-16(5) and the reason for the expenditures.

The Department of the Attorney General promulgated chapter 5-51, Hawaii Administrative Rules (HAR), entitled "Administrative Asset Forfeiture," on December 31, 2019, which went effect on January 17, 2020. The rules clarify the procedures applicable to county law enforcement officials and those seeking remission or mitigation of an asset forfeiture decision. Chapter 5-51, HAR, also establishes policies and procedures that facilitate consistent and timely processing of prosecuting attorneys' petitions for administrative asset forfeiture. Additionally, chapter 5-51, HAR, requires that all seizing and prosecutorial agencies comply with the National Code of Professional Conduct for Asset Forfeiture.

II. HISTORY OF ASSET FORFEITURE

The first statute authorizing civil forfeiture was enacted by Congress in 1789 as a sanction for the use of ships in customs violations.¹ In 1978, Congress expanded the law to permit the civil forfeiture of all money used in or acquired from the illegal drug

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

exchange² and authorized the forfeiture of real property in 1984.³ Federal civil and criminal forfeiture statutes now reach substantially the same offenses and types of property. All fifty states and the District of Columbia have some type of civil and/or criminal forfeiture statutes in effect.⁴

As a result of these statutes, criminals are deprived of their working capital and illicitly-obtained profits, thereby preventing them from operating even where traditional criminal sanctions have not otherwise deterred them. A secondary benefit of the 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 primary purpose and benefit of a forfeiture program is crime deterrence, it is appropriate to use the forfeited property to hinder those who profit from criminal activity.

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, HRS, provides for administrative forfeitures and judicial forfeitures. 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 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.

The Attorney General administers distribution of forfeited property up to the ceiling according to the criteria of section 712A-16, HRS. In 1990, the Legislature amended chapter 712A to require an annual report on the use of the Hawaii omnibus criminal forfeiture act and the disposition of property forfeited pursuant to it, including the amount of money deposited into and expended from the criminal forfeiture fund. In 1996, the Legislature further amended chapter 712A to make the state forfeiture law permanent.

² 21 U.S.C. § 881(a)(6).

³ 21 U.S.C. § 881(a)(7).

⁴ National Criminal Justice Association, Asset Seizure & Forfeiture: Developing and Maintaining A State Capability, App. A (1988).

IV. ADMINISTRATIVE FORFEITURE

Perhaps the most important advantage afforded by chapter 712A is a provision pursuant to 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 the 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 asserting under oath that the property is not subject to forfeiture and request the forfeiture be removed to court for judicial review. To file a claim, 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 the expiration of thirty days. Alternately, the Attorney General may find a procedural or substantive issue with the case and dismiss the prosecuting attorney's petition sua sponte with or without prejudice.

By these means, forfeiture proceedings can be handled administratively without unnecessary consumption of valuable judicial resources and while still providing claimants 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 its disposition 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; or destroy

contraband or raw materials or equipment used to manufacture controlled substances.

Pursuant to section 712A-16(2), HRS, the Attorney General distributes a twenty-five per cent share of forfeited currency or sale proceeds of forfeited property, if any, to each agency that seized the property⁵ and the prosecuting attorney that initiated the administrative or judicial forfeiture proceeding respectively. The remaining fifty 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 may distribute 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 appropriated to law enforcement agencies. Strong emphasis has been placed on spending money from the criminal forfeiture fund to meet the training and education needs of law enforcement personnel. For example, in the recent years, the money has been used to facilitate handgun training, attend and provide seminars on heroin, fentanyl, and opioids, and purchase safety vests.

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⁵ The seizing agencies may include the Hawaii County Police Department (HCPD), the Honolulu Police Department (HPD), the Maui Police Department (MPD), and the Kauai Police Department (KPD).

VI. ASSET FORFEITURE: FY 2019-2020

1. Total amount of property seized by law enforcement agencies

ESTIMATED VALUE⁶ OF SEIZURES FOR FORFEITURE⁷ IN FY 2019-2020 (BY SEIZING AGENCY⁸)

<u>Seizing Agency</u>	<u>Currency</u>	<u>Vehicles</u>	<u>Misc. Property</u>	<u>Real Property</u>	<u>Total</u>	<u>Percentage</u>
HCPD	\$128,217	\$211,554	\$3,550	\$35,579*	\$378,900	35.48%
HPD	\$174,147	\$3,000	\$2,660	\$0	\$179,807	31.68%
MPD	\$211,601	\$9,718	\$76,211	\$0	\$297,530	16.24%
KPD	\$21,676	\$85,142	\$0	\$0	\$106,818	16.60%
TOTAL	<u>\$535,641</u>	<u>\$309,414</u>	<u>\$82,421</u>	<u>\$35,579</u>	<u>\$963,055</u>	<u>100.00%</u>

Note*: HCPD Real Property - Net amount (seizing and prosecuting agency share paid directly per court order) from Judicial Filing Complaint for Partition and Sale (Civ. No.18-1-0249, Third Circuit Court).

ESTIMATED VALUE OF SEIZURES FOR FORFEITURE IN FY 2019-2020 (BY TYPE OF PROPERTY)

	<u>Estimated Value</u>	<u>Percentage</u>
Vehicles	\$309,414	32.13%
Currency	\$535,641	55.62%
Misc. Property	\$82,421	8.56%
Real Property	<u>\$35,579</u>	<u>3.69%</u>
TOTAL	<u>\$963,055</u>	<u>100.00%</u>

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 listed in the forfeiture petitions may include contraband (such as untaxed tobacco, firearms, and gambling machines) and property found to be unsafe or in poor condition that is eventually destroyed. Estimated values of forfeited firearms (\$2,712) and gambling machines (\$73,498), as included in two Maui County petitions, which have been requested by MPD, the seizing agency, for training, are not included in this chart because they are contraband.

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

⁸ Seizing agencies also include the Department of the Attorney General, Department of Land and Natural Resources, Department of Public Safety, and the Narcotics Enforcement Division. These agencies seldom seize property and did not seize any property in fiscal year 2019-2020.

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

In fiscal year 2019-2020, prosecuting attorneys⁹ filed 68 petitions for administrative forfeiture with the Department of the Attorney General. Of the 68 petitions, 22 were filed by Hawaii County, 17 were filed by Honolulu County, 24 were filed by Maui County, and five were filed by Kauai County. Of the 68 petitions; 41 petitions were adjudicated and final orders were issued by the Department; one was withdrawn; and 26 petitions were pending service, publication, statutory deadlines, outcome of judicial claim, or decision on petition for remission or mitigation,¹⁰ or had just been filed.

In fiscal year 2019-2020, the Department of the Attorney General processed a total of 107 cases. Of the 107 cases; 41 cases were filed in fiscal year 2019-2020, and 66 cases were pending from previous fiscal years. Of the 107 cases, 71 cases involved uncontested forfeiture (i.e. persons with an interest in the property did not respond to the notice of pending forfeiture); 11 cases involved petitions for remission or mitigation; two involved judicial proceedings; three were dismissed with or without prejudice, and one 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 2019-2020, two 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 2019-2020, both claims had been settled.

In fiscal year 2019-2020, seven petitions for remission or mitigation were filed. At the close of the fiscal year, all seven of the petitions had been resolved with an order granting or denying, in whole or in part a petition for remission or mitigation.

⁹ "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. The Attorney General did not file any petitions in fiscal year 2019-2020.

¹⁰ 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 estimated value thereof

ESTIMATED VALUE OF FORFEITURES⁶ ORDERED IN FY 2019-2020

<u>Seizing Agency</u>	<u>Currency</u>	<u>Vehicles</u>	<u>Misc. Property</u>	<u>Real Property</u>	<u>Total</u>	<u>Percentage</u>
HCPD	\$126,855	\$98,520	\$3,400	\$35,579*	\$264,354	31.90%
HPD	\$174,147	\$3,000	\$2,660	\$0	\$179,807	21.70%
MPD	\$193,636	\$9,718	\$76,211	\$0	\$279,566	33.70%
KPD	\$19,740	\$85,142	\$0	\$0	\$104,882	12.70%
TOTAL	<u>\$514,378</u>	<u>\$196,380</u>	<u>\$82,271</u>	<u>\$35,579</u>	<u>\$828,609</u>	<u>100.00%</u>

Note*: HCPD Real Property - Net amount (seizing and prosecuting agency share paid directly per court order) from Judicial Filing Complaint for Partition and Sale (Civ. No.18-1-0249, Third Circuit Court).

No auctions were held for the Fiscal Year 2019-2020 due to a lack of saleable property. Property pending sale will be held until the next scheduled auctions in FY 2020-2021¹¹

5. Amount of money deposited into the criminal forfeiture fund

Pursuant to the formula set forth in section 712A-16(2)(c), \$354,313.24 was deposited into the criminal forfeiture fund.

6. 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), \$290,186.76 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, firearms, and ammunition with an estimated total value of \$25,138.92 was transferred to the Hawaii County, Kauai, Maui and Honolulu Police Departments.

¹¹ 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 Department of 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	\$5,845.38	Glock Operators training
Newspaper Publication of Legal Notice	\$12,064.98	Notice of Pending Forfeiture
Upkeep/Storage of Forfeited Assets	\$3,356.77	Alarm system operation and utilities (including electricity and phone line for alarm); towing of vehicles; equipment; real property upkeep
Auction Expenditures	\$3,332.81	Automotive repair and parts; overtime payments; shipping and towing of vehicles; auctioneer services
Payroll Expenditures for the Asset Forfeiture Unit	\$176,012.48	Asset Forfeiture Program manager, legal assistant, and secretary salaries; related payroll taxes
Other Operating Expenses	\$921.02	Office supplies; petty cash replenishment, reimbursement, air fare/car rental
	\$1,239.11	PRODCICS ¹² access
Return of Seized Funds	\$5,133.00	Vehicle insurance, parking, gas, upkeep
	\$2,004.00	AG# 18-04794 Order Dismissing with Prejudice
	\$2,004.00	AG# 18-13448 Order Granting in Part and Denying in Part
	\$1,800.00	AG# 18-16503 Order Granting in Part VPRM
	\$1,856.74	AG# 17-17028 Order Pursuant to Settlement Stip. in S.P. 18-00035
	\$17,965.00	AG# 18-18863 Order Granting in Part and Denying in Part
	\$100.00	AG# 19-08487 Order Granting in Part and Denying in Part
	\$1,415.00	AG# 19-07506 Order Granting in Part and Denying in Part
	\$521.28	AG# 18-17981 Order Denying VPRM, Granting in Part and Denying in Part
TOTAL:	\$233,567.57	

¹² PRODCICS stands for Production Customer Information Control System. It is the City and County of Honolulu's secured mainframe online transaction processing environment that allows users to access mainframe-based programs like the Motor Vehicle Registration system. The Department uses PRODCICS to search for vehicle, registered owner, and legal owner information and verify vehicle identification numbers.