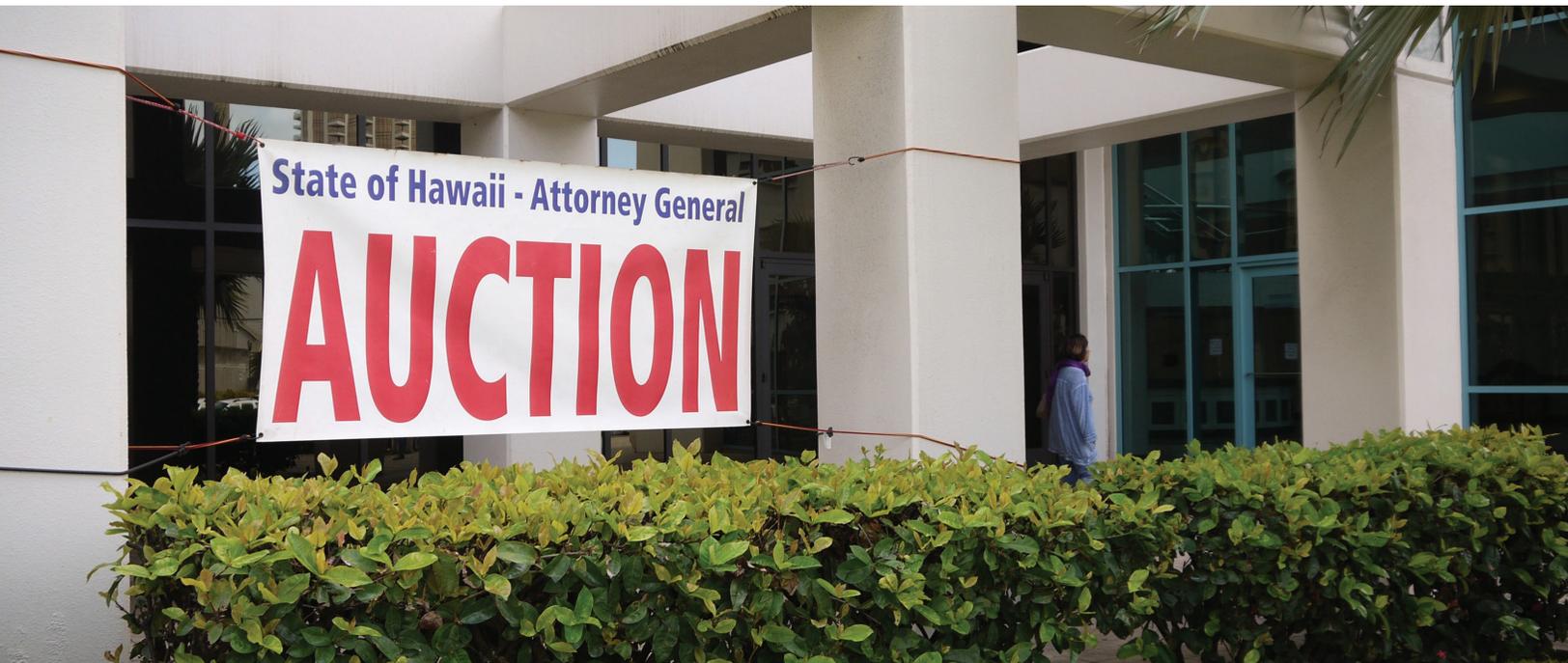

Follow-Up on Recommendations from Report No. 18-09, *Audit of the Department of the Attorney General's Asset Forfeiture Program*

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

Report No. 21-09
July 2021



OFFICE OF THE AUDITOR
STATE OF HAWAII



OFFICE OF THE AUDITOR STATE OF HAWAII

Constitutional Mandate

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.

Our Mission

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, 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.

We report our findings and make recommendations to the governor and the Legislature to help them make informed decisions.

For more information on the Office of the Auditor, visit our website:
<https://auditor.hawaii.gov>



PHOTO: OFFICE OF THE AUDITOR

Follow-Up on Recommendations from Report No. 18-09, *Audit of the Department of the Attorney General’s Asset Forfeiture Program*

Section 23-7.5, Hawai‘i Revised Statutes, requires the Auditor to report to the Legislature annually on each audit recommendation more than one year old that has not been implemented by the audited department or agency. First, annually, we ask agencies to report the status of their implementation of our audit recommendations. We compile agencies’ self-reported implementation status in a consolidated report. Second, we conduct an “active” follow-up two to three years after issuance of the audit report containing the recommendations where we, independently, assess the agency’s progress in implementing each recommendation and issue a separate follow-up report. This report presents the results of our review of seven recommendations made to the Department of the Attorney General in Report No. 18-09, *Audit of the Department of the Attorney General’s Asset Forfeiture Program*, which was published in June 2018.

We found the Department of the Attorney General has implemented 2 and partially implemented 2 of the 7 recommendations made in our report. Three recommendations have not been implemented and remain open.

The Department of the Attorney General’s Asset Forfeiture Program

Asset forfeiture refers, generally, to the government’s ability to confiscate a person’s property without any corresponding payment or compensation. In some cases, the property is illegal contraband. In other cases, the property is alleged to have been used in the commission of a crime. In

still other cases, the property is alleged to be “the fruit of a crime.” The primary purpose of an asset forfeiture program is to deter crime by enabling law enforcement to take away the means by which criminals engage in their unlawful activity as well as the “profits” from that unlawful activity.

Hawai‘i’s administrative asset forfeiture program, established under Chapter 712A, Hawai‘i Revised Statutes (HRS), is administered by the Department of the Attorney General’s (the department) Civil Recoveries Division and authorizes the department to order the forfeiture of property seized by law enforcement. Personal property, such as cars and currency, connected to certain criminal offenses (referred to as “covered offenses”) may be forfeited without a court hearing, without compensation, and at times, without even a criminal charge filed against the property owner. Hawai‘i law provides petitions and orders may be approved by the Attorney General, who is the chief law enforcement officer of the state.

Forfeited funds and proceeds from the sale of forfeited property are deposited into the Criminal Forfeiture Fund. By statute, the law enforcement agency that seized the cash or property and the prosecuting attorney’s office that applied for forfeiture of the cash or property each receive 25 percent of the cash or proceeds from the sale of the forfeited property. The remaining 50 percent is used to support the program, including the salaries of program staff.

Why we did the 2018 audit

We conducted the audit pursuant to House Concurrent Resolution No. 4 of the 2016 Legislative Session, which required the Auditor to conduct an audit of the administrative asset forfeiture program of the department, including an evaluation of the efficiency and effectiveness of the program; and whether the program used moneys for intended purposes. The audit was also to include an accounting of money and property seized and disposed of through asset forfeitures, and a determination of how many asset forfeitures occurred in cases that did not result in criminal convictions. In response to that request, we issued Report No. 18-09, *Audit of the Department of the Attorney General's Asset Forfeiture Program*.

What we found in 2018

In Report No. 18-09, we found the department was administering the program without administrative rules describing the specific procedures and practice requirements for asset forfeiture or clear internal policies and procedures to ensure that petitions for forfeiture as well as petitions for remission or mitigation are timely and consistently processed.

The lack of administrative rules was notable; despite the program's ability to promulgate rules without having to comply with formal rulemaking requirements of Chapter 91, HRS, the department had yet to adopt administrative rules. We found the rules simply had not been a priority for the department. In the absence of administrative rules, the program was providing only informal, piecemeal guidance to law enforcement agencies and the public, resulting in, among other things, numerous petitions for forfeiture being dismissed by the department and inconsistent handling of forfeited property by county police departments.

We also found the program manager was acting only as a property manager in charge of overseeing forfeited property, but neither actively guiding the program's day-to-day activities nor overseeing the financial management of the program. Other management responsibilities, such as establishing internal program procedures, as well as accounting for program costs and proceeds, were being handled by various individuals, instead of a dedicated program manager. We found that petitions for administrative forfeiture languished – during the two-year period from July 2012 through July 2014 processing petitions took an average of 561 days – and that the program was unable to accurately account for forfeited property. We also found that the program was unaware of the requirement that 20 percent of the moneys deposited into the Criminal Forfeiture Fund be used to support drug abuse education, prevention, and rehabilitation programs. We could not identify any program disbursements that complied with the requirement.

What we found in 2021

Our follow-up on the department's implementation of the recommendations made in Report No. 18-09, conducted between February and March 2021, involved examining relevant documents and records, interviewing the program manager, and evaluating whether the department's actions addressed the recommendations.

Our first recommendation related to the department's need to promulgate administrative rules, and our second recommendation addressed the need for clear internal policies and procedures. Our third recommendation involved strengthening internal controls to provide transparency and accountability for forfeited property and program funds and included five separate sub-parts. Including the sub-parts of recommendation three, the following analysis covers a total of seven recommendations.

We found that the department implemented two of the recommendations; two recommendations were partially implemented; and three were not implemented and remain open.

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

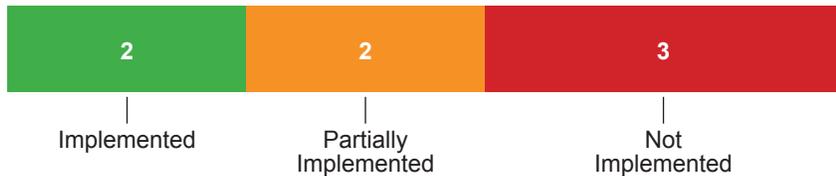
where the department or agency disagreed with the recommendation, did not intend to implement, and no further action will be reported.

Recommendations and their status

Our follow-up efforts were limited to reviewing and reporting the implementation status of our audit recommendations. We did not explore new issues or revisit old ones that did not relate to the original recommendations. The following details the audit recommendations made and the current implementation status of each recommendation based on our review of information and documents provided by the Department of the Attorney General, and other publicly available information.

Exhibit 1

Audit Recommendations by Status



Source: Office of the Auditor

Recommendation 1

The Department of the Attorney General should promulgate administrative rules necessary to provide direction to county prosecutors, police departments, and those seeking remission or mitigation.

Implemented

Comments

This recommendation was made in light of the administrative asset forfeiture program having gone without administrative rules since its inception, nearly 30 years earlier. When the Legislature enacted Chapter 712A, HRS, it expressly noted its intention that the department provide the details necessary to implement the administrative asset forfeiture program through administrative rules – governing the entire process, from filing the petition for forfeiture to the disposition of forfeited property and the use of the proceeds from the sale of forfeited property.

Report No. 18-09 found the lack of administrative rules directly impacted law enforcement and the owners of property that law enforcement petitioned to forfeit, resulting in a significant number of petitions for administrative forfeiture being dismissed because prosecutors were unclear as to the department’s requirements. From July 2012 to June 2015, 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 of forfeiture procedures to owners whose property has been seized; and technical errors in documents.

The lack of administrative rules also directly impacted the owners of property seized by law enforcement. While the statute identifies the information a person seeking remission or mitigation must provide, the provisions in the law that relate to forfeiture do not address a number of issues relating to the process an applicant must go through. Report No. 18-09 recommended the department promulgate administrative rules that clearly dictated the procedures for seeking remission or mitigation. Given the relatively low bar for authorities to seize and forfeit a person’s property, the report emphasized the importance of ensuring that property owners are afforded every opportunity to retain ownership of their property and to mitigate any hardship caused by the seizure.

According to the department, Recommendation 1 was implemented with the promulgation of Chapter 5-51, Hawai‘i Administrative Rules (HAR), titled “Administrative Asset Forfeiture,” effective

January 17, 2020. Our review of Chapter 5-51, HAR, confirmed that the rules help clarify the procedures applicable to county law enforcement officials, specifying the information that must be provided in a petition for administrative forfeiture, including the individual and aggregate value of all property, a statement of the covered offenses under which the property is subject to forfeiture, a statement of facts sufficient to support probable cause for forfeiture, a list of all known persons with an interest in the property, and copies of relevant police reports.

The administrative rules also include procedures applicable to those seeking remission or mitigation of forfeiture, such as who may file such a petition and what information is to be included in a petition filing. The rules further describe when remission is not warranted, the conditions under which mitigation may be granted, and the procedure under which such petitions should be reviewed for compliance with petition requirements.

While we agree that the department has promulgated administrative rules that address the recommendation, we note the following issues with the rules for the department's further consideration:

First, the Preamble of the administrative rules expressly incorporates the National Code of Professional Conduct for Asset Forfeiture, which requires, among other things, *seizing entities* to have a manual detailing the statutory grounds for forfeiture and the procedures for prompt notice to interest holders, expeditious release of seized property, and the prompt resolution of claims of innocent ownership. The national code provides that *seizing entities* retaining forfeited property must ensure that property is subject to appropriate internal controls. It is beyond the scope of our current review to assess the department's processes to ensure compliance by police and prosecutors with that and other requirements in the National Code of Professional Conduct for Asset Forfeiture. However, we note that the rules do not require law enforcement agencies seeking forfeiture to provide the department with their respective manuals or include other means by which the department can confirm those agencies' compliance with the National Code of Professional Conduct for Asset Forfeiture.

Second, we note the administrative rules do not address the process by which organizations can request and receive moneys from the Criminal Forfeiture Fund for drug abuse education, prevention, and rehabilitation programs. In Report No. 18-09, we found that the department was unaware of the requirement in Act 104 (Session Laws of Hawai'i (SLH) 1996) directing 20 percent of moneys deposited into the Criminal Forfeiture Fund be used to support drug abuse education, prevention, and rehabilitation programs. From FY2004 through FY2017, \$10.2 million was deposited into the Criminal Forfeiture

Fund; to date, the department has made no disbursements to potentially qualifying agencies pursuant to Act 104. We suggest that administrative rules are needed to guide and direct those organizations that may provide the services required by Act 104 to apply for funding, and, given that the department is empowered to promulgate administrative rules relating to the program without having to comply with the requirements of the Hawai‘i Administrative Procedures Act, Chapter 91, HRS, the department should do so as soon as possible.

Recommendation 2

The Department of the Attorney General should 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.

Not Implemented

Comments

This recommendation was offered to address our finding that the department’s internal processes were informal and scattered, resulting in multiple oversights, including problems with monitoring forfeited property, and inaccurate accounting of funds.

In response to our recommendation that the department develop clear internal policies and procedures to ensure that petitions for administrative forfeiture are processed timely and consistently, the department provided us with a two-page document entitled “Processing of Forfeiture Petitions - Time requirement as cited in the Statute and the Administrative Rules” that includes citations to applicable laws and rules, and contains sections for “POLICE,” “PROSECUTOR,” “ATTORNEY GENERAL,” and “INTERESTED PARTY.” The department represented that the information was developed to promote a better understanding of the timing in the processing of forfeiture petitions. While it provides information about the forfeiture process and statutory timeframes, the document does not constitute written policies and procedures to guide and direct *department staff* in processing petitions for administrative forfeiture. For example, the information does not describe the specific processes or procedures management expects department staff to follow to process petitions for administrative forfeiture, which we recommended be developed to provide assurance the program is processing forfeiture petitions expeditiously and consistently.

It is important that the department document its *internal* processes to ensure that staff review and make decisions on petitions for

administrative forfeiture consistently and timely. Documented procedures also allow management to hold staff accountable for performing their respective duties and identify where the process failed should petitions for administrative forfeiture be unreasonably delayed.

We also suggest that instructions or other requirements applicable to police, prosecutors, and others claiming an interest in the seized property are more appropriately set forth in administrative rules, not in *internal* department procedures.

The department did provide evidence that petitions for administrative forfeiture have been processed in a comparatively more timely fashion, stating petitions were processed on average in 204 days in FY2020, down from 561 days during the two-year period from July 2012 through July 2014. However, 204 days is almost seven months. The department should continue to improve the time in which it processes petitions for administrative forfeiture to minimize any hardship to the property owner should the petition be denied and to preserve the value of the property should it be sold at auction.

Regarding the need for the department to develop clear internal policies and procedures to ensure that forfeited property and program funds are appropriately managed, the department said its master ledger and reconciliation method has been modified from previous practices and has been shown to be an effective way to track financial data. The program manager said that he performs all fiscal tasks, including entering data and maintaining the master ledger, which records deposits, payments, and distributions. He described reconciliation of the master ledger to the Hawai'i Financial Accounting and Management and Information System (FAMIS) as being akin to reconciling a check ledger to a bank statement. Money from cost bonds, seized funds pending disposition, and forfeited funds is entered into the master ledger.

The department provided copies of "instructions" detailing how data is to be entered into the master ledger as well as how the master ledger is to be reconciled at least monthly with FAMIS. It is our understanding that these instructions were created in response to our request for information about the department's implementation of the audit recommendations; however, these or similar written instructions to guide and direct its staff are what the department should adopt to document its processes to account for and reconcile forfeited property, including cash. As explained above, it is important for the department to develop written policies and procedures to ensure that forfeited property is consistently accounted for in an accurate and timely manner.

As discussed in Recommendation 3 below, the department does not maintain an inventory of all forfeited property in its possession. Rather, the program appears focused on the funds obtained upon disposition of property and not the property pending forfeiture which may be subject to remission or mitigation proceedings. As the program manager explained, a list of motor vehicles and other forfeited items to be sold is prepared prior to auction. A complete list of forfeited items that have not been destroyed or otherwise disposed of is not maintained.

Regarding our recommendation that the department develop clear internal policies and procedures to ensure that proceeds from the sale of forfeited property are used for purposes intended by the Legislature, the department simply referred us to Chapter 712A, HRS. However, as we noted in Report No. 18-09, Act 104, SLH 1996 requires that 20 percent of moneys deposited into the Criminal Forfeiture Fund be used to support drug abuse education, prevention, and rehabilitation programs. That requirement is not codified in Chapter 712A-16, HRS, which governs the disposition of forfeited property. For that reason, it is even more important that the department develop written procedures to ensure that it uses 20 percent of the moneys deposited in the fund for the purposes intended by the Legislature.

Recommendation 3a

The Department of the Attorney General should strengthen internal controls to provide transparency and accountability for forfeited property and program funds by establishing basic accounting policies and procedures to properly account for program revenues and expenditures.

Partially Implemented

Comments

This recommendation was made to address the program's lack of policies, procedures, and a manager to guide and oversee day-to-day activities and financial management. We found that guidance was informal and scattered, resulting in multiple oversights, including problems with monitoring forfeited property and inaccurate accounting of funds.

The department cited improvements to its master ledger accounting and reconciliation processes that were implemented in 2019 as responsive to this recommendation. According to the department, since that method was adopted, the ledger has balanced with FAMIS every month.

As required by Chapter 5-51, HAR, the department said properties pending forfeiture and their respective values are listed on the seizing

agency's petition for administrative forfeiture. If an order granting a petition is approved, the information is transferred into the Final Order. That Final Order is provided to the seizing agency, allowing the agency to release the forfeited property to the department. The property is then listed in lots, segregated by "AG number," and tracked in an after-auction report containing the dollar amounts of each forfeited property sold.

We were provided with samples of an auction report, a master list, and a sample of the evidence or property report provided by the Honolulu Police Department as well as a document titled "Master Ledger – Instructions for entry and reconciliation with FAMIS." The master list included a description of the forfeited property sold, the AG number, and amount of the sale. Although the department showed that it may have improved its procedures, the basis for the recommendation was the lack of documented *accounting* policies and procedures and other internal controls to accurately account for the forfeited property and program funds. As we noted, the instructions that the department provided appear to have been created in response to our inquiry. The department has not otherwise documented its policies and procedures or other internal controls. As this has yet to have been addressed, we determine that this recommendation has been only partially implemented.

Recommendation 3b

The Department of the Attorney General should strengthen internal controls to provide transparency and accountability for forfeited property and program funds by 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.

Not Implemented

Comments

This recommendation was made because the department was not maintaining a complete inventory of forfeited property, much of which is held by the county police departments until an auction is scheduled. The program manager told us that he only maintained a list of the forfeited property that was stored in the department's warehouse to be auctioned. The 2018 audit also 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.

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; transfer forfeited property to a state or county agency; sell or destroy forfeited property used to manufacture a controlled substance; or make any other disposition of forfeited property as allowed by law.

As noted above, the department's practice is to assemble a list of forfeited property in advance of a public auction, and as of February 2021, the department has not held a public auction of forfeited property since Report No. 18-09 was released. The department said a public auction has not been held in part because of the COVID-19 pandemic as well as because of a lack of forfeited vehicles, since vehicles are the primary items that draw public interest in the auctions. Although estimated values of property seized and estimated values of property forfeited are included in the program's most recent annual report, a ready inventory of property pending forfeiture is still not maintained. The department also does not keep complete lists of items that have been destroyed or otherwise disposed of. Without a process to ensure that the department maintains a complete and up-to-date inventory of forfeited property, including property held by the county police departments, the department likely continues to be unable to accurately account for the property that has been forfeited to the State.

Recommendation 3c

The Department of the Attorney General should strengthen internal controls to provide transparency and accountability for forfeited property and program funds by assigning the periodic and annual reconciliation of and reporting on the Criminal Forfeiture Fund to the department's fiscal section.

Partially Implemented

Comments

This recommendation was based on audit findings that the program's legal assistant, who did not have an accounting background, performed most major daily financial functions, including accounting-related data entry, as well as numerous other accounting and data functions. Neither department management nor other department staff reviewed that data for accuracy. The program's legal assistant reconciled program expenditures annually, for the sole purpose of reporting to

the Legislature. The audit found such annual reconciliations did not provide up-to-date accounts of errors or misstatements. In addition, the program's management did not review the yearly reconciliation.

We determined that previously mentioned improvements made by the department to its master ledger accounting and reconciliation processes were partially responsive to this recommendation. The department represents it hopes to transfer periodic and annual reconciliation responsibilities, as well as the responsibility of reporting on the Criminal Forfeiture Fund, to its fiscal office next fiscal year.

Recommendation 3d

The Department of the Attorney General should strengthen internal controls to provide transparency and accountability for forfeited property and program funds by preparing a short- and long-term forecast of revenues and expenditures of the Criminal Forfeiture Fund to ensure self-sustainability.

Implemented

Comments

This recommendation was made based on the department's failure to produce monthly or quarterly reports of the Criminal Forfeiture Fund's balance. As a result, the program had no way of knowing if it was complying with its internal policy to maintain a minimum fund balance of \$250,000 to ensure sufficient moneys to fund the program, including the salaries of program staff. The department also did not know at year's end, or at any given time, whether adequate funds existed to meet program needs. The 2018 audit raised the concern that, without proper forecasting of revenues and expenditures, the Criminal Forfeiture Fund may not be financially self-sustaining, which is a statutory requirement for revolving funds like the Criminal Forfeiture Fund.

The department, which said it now does yearly forecasts on revenue and expenses, provided a revenue estimate of \$510,000 for FY2021, which was based on a 30 percent reduction in forfeited property from the previous year. However, the department stressed that the program does not initiate forfeiture actions and therefore is dependent on county and state law enforcement agencies to initiate forfeiture actions. Petitions must also be processed to completion and the forfeited property sold at public auction before any revenue is realized. The department noted the COVID-19 pandemic has affected the number of petitions for administrative forfeiture; as of February 2021, the program had only \$200,000 in currency and property forfeited. As a result, the department anticipated that the revenue forecast for FY2021

would fall short by a fair margin. The department intends to maintain a minimum balance of no less than \$200,000 for administrative costs for FY2022. Given that the current balance is \$200,000, it is imperative that the department accurately project revenues and expenditures, and develop accounting policies and procedures to ensure that the fund balances are accurate and up-to-date.

Recommendation 3e

The Department of the Attorney General should strengthen internal controls to provide transparency and accountability for forfeited property and program funds by ensuring the department complies with Act 104 (Session Laws of Hawai'i (SLH) 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.

Not Implemented

Comments

One of the purposes for which the Legislature intended the proceeds from forfeited property to be used is to support drug abuse education, prevention, and rehabilitation programs. Act 104, SLH 1996, unambiguously requires the department to allocate 20 percent of moneys deposited into the Criminal Forfeiture Fund to support those types of programs. In Report No. 18-09, we found that, although \$10.2 million had been deposited into the Criminal Forfeiture Fund from FY2004–FY2017, the department has not disbursed any moneys as required by Act 104.

The department said it has not addressed this recommendation and is still exploring options to address the finding. Meanwhile, no disbursements pursuant to Act 104 have occurred.

