office of the Ombudsman
State of Hawaii
fiscal year 1986-1987
report number 18

STATE OF HAWAII

REPORT of the OMBUDSMAN

FOR THE PERIOD JULY 1, 1986 - JUNE 30, 1987
REPORT NO. 18

PRESENTED TO THE LEGISLATURE
PURSUANT TO SECTION 96-16 OF
THE HAWAII REVISED STATUTES

January 1988

Mr. President, Mr. Speaker, and Members of the Hawaii State Legislature of 1988:

In compliance with section 96-16, Hawaii Revised Statutes, I submit the report of the activities of the Office of the Ombudsman for fiscal year 1986-87. This is the eighteenth annual report since the establishment of the office in 1969.

We take this opportunity to thank the members of the State Legislature, the Governor, the Mayors and Councils of the various counties, and the State and County department heads and employees for their continued cooperation and assistance in our attempts to resolve citizen complaints and concerns.

To Acting First Assistant Karen Blondin, Mr. Gillman Chu, Mr. David Tomatani, Mr. Alfred Itamura, Mr. Lawrence Kawasaki, Mrs. Norma Crowder, Mr. Herbert Almeida, Mrs. Ellen Onaga, Mrs. Jean Fujimoto, Mrs. Edna de la Cruz, and Mrs. Lynn Iwamasa, I convey my personal thanks for their dedicated services to those who have sought the assistance of our office.

Respectfully submitted,

Wayne Matsuo

WAYNE MATSUO
Acting Ombudsman

January 1988

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CHAPTER I

THE HAWAII OMBUDSMAN: THE FIRST EIGHTEEN YEARS

The Hawaii State Office of the Ombudsman receives and investigates complaints from members of the public concerning administrative action or inaction by executive agencies of the State and County governments. The Ombudsman's jurisdiction does not extend to the Judiciary and its staff; the Legislature, its committees, and its staff; federal agencies or multistate agencies; the Governor, Lieutenant Governor, and their personal staff; and the Mayors and Councils of the four counties.

The Ombudsman aims to resolve individual complaints and to improve administrative processes and procedures by recommending the adoption or modification of agency practices, policies, rules, or statutes.

INQUIRIES RECEIVED

The Ombudsman, whose office is located on Oahu, receives inquiries from members of the public by telephone, correspondence, or personal visit. Persons on islands other than Oahu may inquire with the Ombudsman by placing a long-distance, station-to-station collect call through the operator. Staff representatives of the Ombudsman also make regularly scheduled visits to the islands of Hawaii, Kauai, and Maui.

Although the Ombudsman's primary function is to receive and investigate complaints about executive agencies or personnel, the Ombudsman also receives complaints about agencies or persons outside the Ombudsman's jurisdiction. Additionally, inquirers contact the Ombudsman to request information rather than to file complaints. The Ombudsman's actions with regard to non-jurisdictional complaints and informational inquiries are discussed later in this chapter.

The following table indicates the number of complaints and informational and non-jurisdictional inquiries that the office received from July 1, 1969 until June 30, 1987.

Year	Complaint	Information	No Jurisdiction	Total Inquiries
1986-87	3,073	1,222	354	4,649
1985-86	2,547	1,254	469	4,270
1984-85	2,222	1,429	464	4,115
1983-84	1,975	1,566	506	4,047
1982-83	1,757	1,471	569	3,797
1981-82	1,925	1,377	649	3,951
1980-81	1,369	1,056	490	2,915
1979-80	1,259	1,329	423	3,011
1978-79	1,211	1,410	567	3,188
1977-78	1,252	1,296	535	3,083
1976-77	1,308	1,216	607	3,131
1975-76	1,367	1,172	646	3,185
1974-75	1,305	1,035	752	3,092
1973-74	890	739	533	2,162
1972-73	959	573	509	2,041
1971-72	807	513	358	1,678
1970-71	822	621	315	1,758
1969-70	678	133	243	1,054
TOTAL	26,726	19,412	8,989	55,127

As indicated in the table, there has been a substantial increase in the number of inquiries received by the Ombudsman since operations began in 1969. We attribute this increase to heightened public awareness of the existence and function of the Ombudsman and the accessibility of the Ombudsman's Office to members of the public by telephone, correspondence, or visit. The increase also reflects the need for an independent and impartial complaint investigation process to assist citizens in dealing with an increasingly complex and pluralistic network of government agencies.

COMPLAINT INVESTIGATION - THE PRIMARY FUNCTION

The main objective of the Ombudsman is to achieve fair and equitable treatment for members of the public. This objective is accomplished by investigation and reasoned persuasion.

Since the Ombudsman has access to records and information from government officials by virtue of statutory authority, and because of the knowledge and experience of the Ombudsman and his staff, the Ombudsman can resolve complaints more readily than most individual members of the general public. The effectiveness of the Ombudsman is especially evident in cases involving multiple agencies or requiring a long period of time to resolve.

In case number 82-1427, a man complained of a delay in repairing a collapsed portion of a retaining wall along the Ala Wai Canal. The City and County of Honolulu, the Department of Land and Natural Resources, and the Department of Transportation (DOT) did not agree as to which governmental entity was responsible for the repairs.

We inquired about and monitored the resolution of the disagreement over the responsibility for the repairs. The Department of Accounting and General Services conducted a field survey to assist in resolving the dispute and thereafter the Department of the Attorney General resolved the dispute by rendering an opinion that the DOT was responsible for the repairs.

Thereafter, we monitored the DOT's efforts to complete the repairs. The DOT sought funds from the Legislature to perform the necessary repairs and after receiving a legislative appropriation, the DOT contracted with a private firm to perform the work. The repair work began approximately three years after our receipt of the complaint. We informed the complainant of the commencement of the repairs.

Unjustified Complaints

During the first eighteen years of operation, in the cases in which the Ombudsman completed an investigation and arrived at a finding, 62% of the complaints were found to be unjustified.

When a complaint is found to be unjustified, the Ombudsman explains to the complainant the reason(s) the complaint cannot be substantiated and the desired remedy cannot be provided. However, even in instances in which the Ombudsman finds the complaint to be unjustified, an agency may voluntarily assist the complainant to resolve the problem.

In case number 85-1349, a retiree complained that he was not reimbursed for Medicare premiums he paid. The complainant noted that his friend, who was also a retiree, received such reimbursements from the Employees' Retirement System (ERS).

Upon inquiry with the ERS and the Hawaii Public Employees' Health Fund (Health Fund), we learned that the complainant was not enrolled in any State medical plan, in the Health Fund's Medicare supplemental plan, or in the life insurance plan, although the plans were available to retirees at no cost.

Section 6-34-8, Hawaii Administrative Rules, required partial reimbursement of Medicare premiums paid to the Social Security Administration by retirees enrolled in Part B of the Federal Medicare plan and in the Health Fund's Medicare supplemental plan. Since the complainant was not enrolled in the Medicare supplemental plan, he was not entitled to the reimbursement, and his complaint was not justified.

To assist the complainant, the Health Fund advised him to submit a request for special enrollment. After the complainant submitted the request, the Health Fund approved the request and enrolled the complainant in a State medical plan, the Medicare supplemental plan and the life insurance plan, effective on the date of his initial inquiry several months before. As a result, the complainant qualified for a retroactive reimbursement of $166 in Medicare premiums.

At times when the Ombudsman cannot substantiate a complaint, some complainants are nonetheless satisfied because an investigation is conducted by a neutral third party rather than by the agency responsible for the action or inaction.

In case number 85-2727, a complainant on a neighbor island disagreed with the investigative findings of the Airports Division (AD) regarding his complaint that other taxi drivers harassed drivers of his taxi company at the airport. We travelled to the neighbor island and met with the complainant and two of his drivers. After reviewing the AD's investigation reports and discussing the complaint with AD officials, we agreed with the AD's conclusion that there was insufficient evidence to substantiate the complainant's allegations. We informed the complainant of our findings.

Although the complainant maintained that the AD investigation was inadequate, he derived a degree of satisfaction from our investigation of his complaint, as he stated in a letter:

> *As I stated in a previous letter to you, I am 110% satisfied with all you have done, the time you put in getting to the bottom of the complaints, and I too, consider this specific incident closed.*

At other times, however, the hostility that is originally directed at an agency is redirected toward the Ombudsman. It is a common experience of Ombudsmen throughout the world to become the target of a complaint in the course of investigating a complaint. Dissatisfied complainants may feel that the Ombudsman is biased in favor of agencies, that staff members are incompetent, that a thorough investigation was not conducted, or that the Ombudsman's findings are illogical.

For example, an inmate who complained to the Ombudsman about inadequate hot water delivery to his residency unit wrote in part:

> Upon receipt of your August 5, 1978 [sic] letter concerning the hot water delivery to [residency unit], I took a cold shower to cool off. To do so, all I had to do was turn on the hot water faucet in the shower and came cold water. . . . You have been deliberately misinformed if prison officials state otherwise. . . .

Asking prison officials if the problem has been resolved, is like asking the fox guarding the chicken coop if any chickens are missing. . . .

Justified Complaints

In those cases during the first eighteen years of operation in which the Ombudsman completed an investigation and arrived at a finding, 38% of the complaints were found to be justified or partially justified.

When the Ombudsman finds that a complaint is justified, the Ombudsman may recommend, but cannot require, that the agency take corrective action. Corrective action may include providing the remedy the complainant seeks or correcting the cause of the problem by modifying existing practices, rules, or statutes.

The Ombudsman's recommendation must be based on thorough investigation and analysis because an agency is more likely to accept a recommendation based upon thorough fact-finding and sound reasoning. The effectiveness of the Ombudsman's reasoned persuasion is dependent upon agencies' allegiance to the principles of fairness and equity. Agencies often demonstrate their belief in these principles by their willingness to consider alternative courses of action to resolve complaints that the Ombudsman has found to be justified. Corrective action taken by agencies may benefit not only the person who complained to the Ombudsman, but others in the same circumstances as well.

In case number 85-3449, a complainant who exhausted his regular unemployment benefits was denied an extension of benefits through a Federal program due to his untimely claim for the extended benefits. Under the Federal Supplemental Compensation Act, the complainant could have received from 8 to 14 weeks of extended unemployment benefits had he submitted a timely claim, but the Unemployment Insurance Division (UID) deemed his claim untimely.

The complainant contended that he did not receive adequate notice of his opportunity to file a claim for extended benefits. He claimed that he reported to the UID office as soon as he could after learning that he could file such a claim.

We learned that a notice advising the complainant to report "immediately" to the UID office after exhausting his regular benefits was typed onto the type of claim card that the UID mailed to the complainant each week during the previous six months. The complainant stated he did not notice the typed notification and therefore submitted the card as a claim for regular benefits. The UID returned the card to the complainant, notifying him that his regular benefits were exhausted.

The complainant thereafter reported to the UID office on the second workday after receiving notice that he exhausted his regular benefits, which was also the sixth calendar day after he received the first notice to report to the UID office. His claim for extended benefits was subsequently denied because he failed to report to the UID office "immediately."

We expressed our concern to the UID that the complainant and other claimants similarly affected may not have received adequate notice of the option of filing a claim for extended benefits and that the instruction to report to the UID office "immediately" may have been inadequate because it did not specify a deadline.

After reviewing the matter, the UID informed us that it would approve the complainant's claim for extended benefits, as well as the claims of others similarly affected.

Although the remedy the complainant seeks is often provided, at other times the remedy is not attainable. In such cases, the complainant may derive satisfaction from the knowledge that the cause of the problem was corrected so that others will not encounter the same problem. Such cases may result in improvement in agencies' processes and procedures and benefit members of the public who have not complained to the Ombudsman.

In case number 83-3054, a taxpayer complained that an income tax preparation instruction booklet published by the Department of Taxation (TAX) failed to advise taxpayers to exclude from their taxable income the portion of the previous year's State income tax refund attributable to a general income tax credit granted by the Legislature.

The TAX confirmed that the portion of the complainant's 1981 income tax refund attributable to the general income tax credit should not be reported as income in her 1982 tax return. The TAX reported that a press release was issued to inform the public of this exclusion, but this information was not included in the instruction booklet.

Since a press release might not be read by all taxpayers, we suggested that the information be included in the instruction booklet for 1983 income tax returns. The TAX Director agreed with the suggestion and informed us that the information would be included in the instruction booklet for 1983 income tax returns.

The TAX has continued to include the information in the income tax instruction booklets published in each subsequent year.

BENEFICIARIES OF OMBUDSMAN'S ACTIONS

During eighteen years of operation, the Ombudsman's efforts have benefited complainants, the general public, and agencies whose actions or inactions were the subjects of complaints. The cases described below illustrate benefits achieved for complainants, the general public, and government agencies.

Complainant

The most obvious beneficial result of a complaint investigation occurs when the complainant receives the desired remedy. The complaint is resolved in a manner in which the complainant receives a direct benefit.

In case number 85-1435, an inmate at a correctional facility complained about the denial of his tort claim by the Department of the Attorney General (AG). The inmate claimed that his wristwatch was confiscated by staff members upon his placement in confinement and thereafter could not be found. In addition, his receipt for the watch, which he gave to a staff member for the return of his watch, could not be located.

We contacted the staff members identified by the inmate as having knowledge of the situation. One staff member recalled that the inmate wore a watch immediately before his placement in confinement; another witnessed the taking of the watch from the inmate by a staff member in the unit where the inmate was confined; and a third staff member was "pretty sure" that the inmate's lost receipt listed a watch.

We informed the AG of the staff members' statements. After confirming the statement of a staff member, the AC proposed a monetary settlement for the lost watch, which the inmate accepted.

Community or General Public

In some cases, the office's investigation of a complaint benefits the community or general public, as well as the complainant.

In case number 86-3410, we received a complaint that the Lanai Community Hospital (LCH) did not have a separate telephone number to request emergency ambulance services. The complainant was concerned that in an emergency, a caller may not be able to contact the LCH if the telephone line was busy.

The LCH confirmed that it had only a single telephone number which allowed access to a two-line rotary system, which was manned 24 hours a day. The Department of Health, which administered the LCH, informed us that the LCH did not have an emergency telephone line because it was cost prohibitive and appeared to be unnecessary.

As part of our investigation, we inquired with the Hawaiian Telephone Company (HTC) about emergency interrupt procedures. We explained that the telephone number for the LCH was not an exclusive emergency number but was instead a general telephone number. The HTC was unaware of the situation and gave the matter its immediate attention. As a result, HTC operators were instructed to interrupt the LCH telephone lines to expedite requests for emergency ambulance services.

The LCH Administrator arranged to have the information regarding the emergency interrupt alternative posted on the community bulletin board to inform residents, since Lanai did not have a newspaper or radio station. The LCH Adminstrator also arranged to add a third line to the existing rotary system to increase the LCH capacity to receive incoming calls.

Thus, as a result of a single complaint, all Lanai residents benefited.

Agencies

As a result of the Ombudsman's investigation, agencies sometimes realize a need to clarify their responsibilities or modify their practices and procedures. Such clarification and modification assist agency personnel in fulfilling their individual responsibilities and result in improvements to an agency's performance of its functions and delivery of its services. Ultimately, the general public benefits from the more efficient operations of an agency.

In case number 85-3293, a parent complained that the principal of a school attended by her six-year-old daughter refused to call the police after the parent reported that her daughter and a female classmate were sexually abused by a teacher at the school. The parent herself contacted the police and a detective later informed her that the teacher would not be returning to work at the school.

We noted that section 350-1.1, Hawaii Revised Statutes (HRS), required employees or officers of public or private schools to report to the Department of Social Services and Housing or to the police when they "know or have reason to believe" that abuse or neglect has occurred or is threatened.

The principal informed us that he thought it was necessary to obtain information in addition to the parent's allegation to determine if there was reason to believe that the children were abused by the teacher. Thus, he planned to talk to the teacher and to the classmate of the complainant's daughter and thereafter to call the police if he had reason to believe the children were abused.

The provisions of the HRS and a Department of Education (DOE) regulation on reporting child abuse and neglect seemed unclear in regard to whether a school official was required to report immediately upon receipt of an allegation, or whether the official should first conduct a preliminary investigation to determine if there was "reason to believe" that abuse occurred. There were also questions as to how school officals should proceed when the accused person is a school employee, as such situations might invoke procedures required by collective bargaining agreements.

We requested that the DOE review and clarify its regulations to more effectively guide DOE officials. Subsequently, the DOE revised its guidelines to require immediate reporting of all suspected abuse and neglect, including cases in which a school employee is the accused person. When an employee is accused, the revised guidelines also required that the principal report immediately to the police and inform the district superintendent and the accused employee of the report.

Although a direct remedy in her case was not possible, the complainant was pleased with the DOE's revisions of its guidelines. The corrective action benefited the agency and the general public because it would enable DOE officials to take more prompt and judicious action in future cases.

Since the Ombudsman has jurisdiction over both State and County agencies, the Ombudsman is able to investigate complaints involving State and County agencies and coordinate the agencies' efforts toward resolving interagency disputes.

In case number 84-1880, an official of the Department of Public Works (DPW), City and County of Honolulu (C&C), sought our assistance because the State Department of Transportation (DOT) refused to accept responsibility for the maintenance of Waimano Home Road. The official stated that the DPW received a complaint about the accumulation of bulky trash items along the shoulder of Waimano Home Road. After investigating, the DPW concluded that the road belonged to the State and thus the State was responsible for the removal of the trash.

Upon our inquiry, the DOT responded that it was not responsible because jurisdiction over Waimano Home Road was transferred from the State to the C&C by a 1968 agreement between the State and the C&C. The DOT provided us a copy of the agreement.

Since the DPW indicated that the land abutting Waimano Home Road might be under the Department of Land and Natural Resources' (DLNR) jurisdiction, we inquired with the DLNR.

The DLNR confirmed that the property abutting the road was under its jurisdiction. However, after inspecting the site, the DLNR denied responsibility for removing the trash because the trash was not on the DLNR's abutting property but was instead located within the road right-of-way, which was part of Waimano Home Road.

The DLNR intended to request that the C&C remove the trash but before the request was made, the State Department of Health removed the trash as part of an annual litter control drive.

Although the immediate problem was thus resolved, the question of responsibility for the maintenance of Waimano Home Road and the road right-of-way remained unsettled. Therefore, we advised the DPW of the DOT and the DLNR positions, provided the DPW with a copy of the 1968 agreement transferring Waimano Home Road from the State to the C&C, and requested a determination by the DPW as to whether it was responsible for the maintenance of the road.

Thereafter, we received written acknowledgement from the DPW of its responsibility for the maintenance of Waimano Home Road, including the removal of trash from within the road right-of-way. To avoid future disagreements and with the DPW's consent, we sent copies of the DPW's acknowledgement of responsibility to the DLNR and the DOT.

Agencies may also benefit when the Ombudsman uncovers the need for a statutory change in the course of investigating a complaint. In such instances, the Ombudsman may bring the matter to the agency's attention and recommend that the agency pursue statutory change or, in the alternative, the Ombudsman may bring the problem to the attention of the Legislature for review and consideration.

In case number 86-499, we learned of counties' concerns regarding the enforcement of the liability insurance requirement applicable to motorcycles and motor scooters. The Departments of Finance of the counties informed us that the insurance requirement for other motor vehicles was enforced through the motor vehicle safety inspection process. Section 286-26(h), HRS, required that a no-fault insurance identification

card be produced as part of the safety inspection process. Existing law, however, exempted motorcycles and motor scooters from the no-fault insurance requirement and instead required that motorcycles and motor scooters have liability insurance coverage. Insurance companies were not required to issue identification cards to liability insurance purchasers.

The counties were concerned that uninsured motorcycles and motor scooters may be operated on public streets and roads. However, the counties did not require proof of liability insurance coverage, as part of the safety inspection process for motorcycles and motor scooters, because the safety inspection statutes did not require proof of such liability insurance. Additionally, since insurance companies were not required to issue liability insurance identification cards, there was no ready means for safety inspection stations to determine whether the required liability insurance was maintained.

We informed the Legislature of the difficulties the counties encountered in enforcing the liability insurance requirement for motorcycles and motor scooters. We also informed the Legislature that the counties felt that if safety inspection stations are to verify that motorcycle and motor scooter owners possess the required liability insurance coverage, a liability insurance identification card should be required by statute to facilitate that verification.

Thereafter, Act 239, 1986 Hawaii Session Laws 413, was enacted, which required insurance companies to issue liability insurance cards to evidence insurance coverage for motorcycles and motor scooters. Act 239 also required motorcycle and motor scooter owners to produce, as part of the safety inspection process, the liability insurance card.

INFORMATIONAL AND NON-JURISDICTIONAL INQUIRIES

Many callers contact the Ombudsman about matters over which the Ombudsman has no jurisdiction or to request information. Although the primary function of the Ombudsman is to investigate complaints, the Ombudsman attempts to serve the public by providing pertinent referrals or information upon receipt of informational or non-jurisdictional inquiries.

Informational Inquiries

When a caller requests information and the Ombudsman's staff is familiar with the subject matter of the inquiry, the caller is readily referred to the proper agency or provided the requested information. At times, however, the information sought by the caller or the appropriate agency to which to refer the caller is

unknown. Some callers have been referred from agency to agency before contacting the Ombudsman and express their frustration at having received "the runaround" and with the apparent inability of government to respond. At such times, the Ombudsman attempts to obtain the requested information or identify the proper agency to which to refer the inquirer.

In case number 87-3070, a resident of a subdivision called on behalf of other residents of the same subdivision. He stated that all of their deeds permitted access to the beach through a particular right-of-way. The owner of the property adjacent to the right-of-way, however, constructed a fence which blocked passage through the right-of-way.

The caller provided us with the information necessary to identify the right-of-way and asked whether there was a government agency that he could contact for assistance.

We contacted the Department of Land and Natural Resources (DLNR) and a land agent determined that the right-of-way was privately owned. Therefore, the DLNR lacked jurisdiction and the matter was a private dispute between the subdivision residents and the property owner who constructed the fence.

We contacted the Tax Maps Branch (TMB), Department of Finance, City and County of Honolulu, to identify the owners of the right-of-way. After reviewing the tax maps, the TMB determined that the property owner who constructed the fence did not own the right-of-way. The TMB provided us with the names of the owners of the right-of-way.

We provided the caller with the information we received from the DLNR and the TMB. The caller indicated that the subdivision residents might seek the assistance of the owners of the right-of-way to have the fence removed and were considering pooling their resources to hire a private attorney.

Non-Jurisdictional Inquiries

Persons unfamiliar with the limitations of the Ombudsman's jurisdiction complain about matters over which the Ombudsman has no jurisdiction. In addition to explaining to the callers our lack of jurisdiction over a particular person, entity, or subject matter, we attempt to assist or direct the caller to an appropriate agency, service, or individual.

In case number 88-246, a man complained that the inaccuracy of a timing device at a parking lot at a private medical center resulted in overcharging motorists for parking fees. We informed the caller of our lack of jurisdiction over the private sector and advised him to bring his complaint to the attention of the medical center administration.

Although we realized that the Department of Transportation Services (DTS), City and County of Honolulu, lacked jurisdiction over private parking lots, we inquired with the DTS staff as to whether there was a government agency to which we could refer the caller. The DTS suggested that we inquire with the Division of Measurement Standards (DMS) of the Department of Agriculture.

The DMS advised us that it had jurisdiction over matters pertaining to the accuracy of measuring devices and confirmed that it could investigate a complaint about the accuracy of the timing device at the parking lot of a private medical center. The DMS also reported that after receiving earlier complaints, it recently investigated the accuracy of the timing device at the parking lot in question. The DMS advised us that the caller could contact the DMS office to discuss the matter and file a complaint.

We contacted the caller and provided him with the information we received from the DMS and the telephone number to the DMS. He informed us that he contacted the medical center administration, which reported that it would also investigate his complaint.

* * *

In case number 87-1504, a couple from Alaska complained that they were not refunded $105 they paid to the district court as bail forfeiture for a charge of operating a motor vehicle without insurance on a public street, road, or highway.

The couple explained that since they planned an extended visit to Hawaii, they decided to purchase a used car upon arrival. Before leaving Alaska, they arranged with their insurance company coverage for the vehicle that they would purchase. After purchasing the vehicle in Hawaii, they provided the insurance company with the necessary information and the vehicle was covered under their insurance policy.

Subsequently, when the couple was stopped by a police officer for an expired safety inspection certificate, they were cited because they were not able to produce a no-fault insurance card. They posted $105 as bail forfeiture and were informed that the money would be returned to them if within 30 days their insurance company verified insurance coverage of the vehicle. After returning to Alaska, the couple arranged for the insurance company to provide the necessary verification to the district court within the 30-day time limit. Several months thereafter, the couple had not received the refund.

Although the Ombudsman lacks jurisdiction over the Judiciary, because of the difficulty the couple might encounter in following up from Alaska with the district court, we informed the administrator of the district court of the complaint and forwarded to her copies of correspondence from the couple.

Subsequently, the administrator informed us that a clerical error was made. The administrator informed the couple of the error and apologized. The processing of a refund of $105 was ordered by the administrative judge.

Although staff resources are expended in responding to informational and non-jurisdictional inquiries, we believe the expenditure is justified since a valuable service is provided to the public. Our belief is reinforced by comments from inquirers, such as expressed in a letter from a private business organization. A manager for the organization wrote, in part:

> My staff and I have contacted your Office for general and specific information on several occasions. In each instance, the Ombudsman's Office representatives were exceptionally responsive and thorough in addressing our inquiries.
>
> We greatly appreciate all of your help. Mahalo!!!

CONCLUSION

In 1969, Hawaii established the first State Ombudsman's Office in the United States. Herman S. Doi was appointed Hawaii State Ombudsman and he served in that capacity from July 1969 until his retirement in December 1984. In his final formal address, reflecting on his 14½ years as an Ombudsman, he stated:

> With experience, I can unequivocally say that while an Ombudsman's Office may not be necessary for the influential or the powerful, it is a necessary recourse for those individual citizens who have neither influential friends to intervene on their behalf, nor sufficient funds, time or knowledge to contest an administrative decision. To that large majority of citizens, an Ombudsman is necessary to equalize the power of an individual complainant with that of an administrative system.

We are convinced of the validity of his assessment. We remain committed to the task.

CHAPTER II

LEGISLATIVE REFERRALS

In the course of the Ombudsman's investigation of complaints, at times problems or issues requiring legislative attention become apparent. In those instances, the Ombudsman brings the matter to the attention of the Legislature for consideration. The case described below is one of those cases. Legislative attention to the case appeared warranted because the Ombudsman was unable to resolve the conflicting legal opinions the State and City and County of Honolulu (C&C) held regarding a fundamental issue of the case, i.e. whether the C&C was responsible for the maintenance and repair of certain public streets/roads.

Description of Complaint

Over the years the Ombudsman received complaints about the maintenance and repair of public streets/roads. The Ombudsman, more recently, received complaints from a Laie resident about the condition of a portion of Wahinepee Street fronting her property and from residents of Waimanalo about the condition of Alaihi and Laumilo Streets. The Laie resident complained that water drained from Wahinepee Street and caused flooding in her yard. The residents in Waimanalo complained that there were cracks in Alaihi and Laumilo Streets and that the streets needed resurfacing.

Investigation

In investigating the complaints about Wahinepee, Alaihi, and Laumilo Streets, we inquired with the Department of Land and Natural Resources (DLNR), State of Hawaii (State), and the Department of Public Works (DPW), C&C, to determine which governmental agency was responsible for the maintenance and repair of the subject streets/roads.

With regard to Wahinepee Street, the DLNR reported as follows:

> [P]ortions of Wahinepee Street was the route of the old Kamehameha Highway. This section of the highway was realigned to the present Kamehameha Highway on or about 1935. The old alignment of Kamehameha Highway was fifty (50) feet wide, which was Deeded to the Minister of the Interior in 1872. The road fronting . . . Wahinepee Street appears to have been widened when the area was subdivided.

The underlying fee title to the original 50 feet wide roadway which is now part of Wahinepee Street is vested in the State of Hawaii. However, since the street is maintained by the City and County of Honolulu, jurisdiction of the area is with the City pursuant to Chapter 264, Hawaii Revised Statutes.

According to the DPW:

[S]aid portion of Wahinepee Street is under State jurisdiction. The State acquired ownership of this portion of roadway (a portion of the old Kamehameha Highway which ran through the Ahupuaa of Laiewai, Koolauloa, Oahu) by virtue of the conveyance by deed from G. Nebeker to the Minister of Interior dated June 20, 1872 and recorded in Liber 35, Pages 234 and 235 at the Bureau of Conveyances. There has been no subsequent conveyance of the land title to the City and County of Honolulu, nor has any maintenance agreement been entered into between the City and the State for City maintenance of this portion of roadway.

With regard to Alaihi and Laumilo Streets, the DLNR reported as follows:

Laumilo Street and portion of Alaihi Street makai of Kalanianaole Highway are within original government lands; therefore, the underlying fee title to these sections is vested with the State of Hawaii. The portion of Alaihi Street mauka of Kalanianaole Highway is within lands owned by the Hawaiian Homes Commission.

Although the underlying fee title of the above-named streets is vested in either the State of Hawaii or in the Hawaiian Homes Commission (HHC), we believe jurisdiction of said street is with the City and County of Honolulu pursuant to agreement with HHC and Chapter 264, Hawaii Revised Statutes. It is our understanding that the City maintains these roadways.

According to the DPW:

[B]oth Alaihi Street and Laumilo Street are under State jurisdiction. These roadways are owned by the State, being portions of the Government (Crown) Land of Waimanalo, as shown on Government Survey Register Map No. 2675 dated 1933, and being portions of the State's Waimanalo Beach Lots Subdivision. There is no record of a conveyance of the land title to the City and County of Honolulu, nor has any maintenance agreement been entered into between the City and the State for City maintenance of these roadways.

Apparently, it was the C&C's position that since fee title to the Wahinepee, Alaihi and Laumilo Streets was vested in the State, the State was responsible for their maintenance and repair. On the other hand, the State maintained that the responsibility rested with the C&C pursuant to Chapter 264, Hawaii Revised Statutes.

Attorney General Opinion

In view of the conflicting positions, we apprised the Department of the Attorney General (AG) of the respective positions of the DLNR and the DPW and requested an opinion on the issue of whether the State or the C&C is responsible for maintaining and repairing these streets/roads.

In response, the AG issued Opinion No. 86-15, dated June 10, 1986. Therein, the AG concluded that the C&C is responsible for maintenance of the streets in question. A copy of AG Opinion No. 86-15 is appended hereto.

We apprised the C&C of the AG's opinion and inquired as to whether the C&C intended to maintain and repair the streets in question and other similar streets in accord with the AG opinion. In response, the C&C expressed disagreement with the AG's opinion and its support of the Department of the Corporation Counsel's Opinion No. 77-35 dated April 29, 1977, a copy of which is appended hereto. The C&C also informed us that it was already providing maintenance services to the streets in question to the level of that provided to non-dedicated or non-surrounding roadways serving six or more individually owned parcels. We noted, however, that the services provided were minimal.

Thereafter, we apprised the State of the C&C's position. Both the State and the C&C indicated that court action was not anticipated to resolve this dispute. However, the State expected legislative measures introduced during the past legislative session to address the issue of which governmental entity is responsible for the maintenance of public streets/roads.

As we could not reconcile the conflicting legal positions of the State and the C&C, and in view of the number of complaints we received about the maintenance and repair of public streets/roads, it appeared that legislative action might be necessary to resolve the long-standing problem. Accordingly, the Ombudsman brought the matter to the attention of the Legislature.

GEORGE R. ARIYOSHI
GOVERNOR

CORINNE K.A. WATANABE
Attorney General

RUTH I. TSUJIMURA
First Dep. Attorney General

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
LAND/TRANSPORTATION DIVISION
ROOM 300, KEKUANAO'A BUILDING
465 SOUTH KING STREET
HONOLULU, HAWAII 96813

June 10, 1986

Mr. Wayne Matsuo
Acting Ombudsman
Kekuanao'a Bldg., 4th Floor
465 South King Street
Honolulu, Hawaii 96813

Dear Mr. Matsuo:

Re: Maintenance of Certain Public Streets and Highways (Ref.: 85-1705(4); 85-1945(5); 85-2076(I); 85-2568(I))

This responds to your request of March 5, 1985, for assistance in resolving the dispute between the State and the City and County of Honolulu concerning the responsibility for maintenance of streets, the paper title to which is reposed in the State.

At the outset, we believe it is important to point out that the statutes clearly place responsibility on the counties for the maintenance of public highways not under the jurisdiction of the Department of Transportation. By Act 4, 1981 Hawaii Sess. Laws 24, the legislature enacted chapter 265A, Hawaii Revised Statutes, which consists of only one section. At the same time, Act 4 repealed chapter 265, Hawaii Revised Statutes. Both section 265A-1, Hawaii Revised Statutes, and its repealed predecessor section 265-1 place the duty of maintenance and repair of county highways on the counties. Section 265A-1 reads in pertinent part:

> §265A-1 County authority. The several councils or other governing bodies of the several political subdivisions of the State shall have . . . the duty to maintain and repair, all county highways. . . .

Op. No. 86-15

In point of fact, the county's duty to maintain public highways (section 265A-1) can be traced back to Act 142, 1947 Hawaii Sess. Laws 251. Section 1(b) of Act 142 amended section 6113, Revised Laws of Hawaii 1945, to read in pertinent part:

> Sec. 6113. In charge of the supervisors. The several boards of supervisors or other governing bodies of the several political subdivisions of the Territory shall have . . . the duty to maintain and repair, all county highways. . . .

Since the duty of the counties to maintain county highways predates the requirement of section 5 of article VIII of the Hawaii State Constitution that the State participate in costs of programs mandated to the counties, there is no requirement thereunder that the State share in the costs. Section 5 of article VIII of the Hawaii State Constitution reads:

> Section 5. If any new program or increase in the level of service under an existing program shall be mandated to any of the political subdivisions by the legislature, it shall provide that the State share in the cost.

We submit that section 265A-1 imposed the same duty as that imposed by section 265-1 and, since section 265-1 pre-existed the constitutional amendment of 1978, the State need not share in the cost of maintaining county highways. Section 265A-1 merely clarifies the duty of the various counties to maintain county highways inasmuch as the ownership of county highways is vested in the respective counties as more fully discussed hereinafter.

With respect tc the question of ownership, section 264-1, Hawaii Revised Statutes, provides that "[p]ublic highways are of two types: (1) State or federal-aid highways which are all those under the jurisdiction of the department of transportation, and (2) County highways, which are all other public highways."

Section 264-2, Hawaii Revised Statutes, then provides that "[t]he ownership of all county highways is transferred to and vested in the respective counties in which the county highways lie." This language was enacted by Act 221, 1965 Hawaii Sess. Laws 338.

The history of section 264-2 goes back to the Highways Act of 1892, chapter 47, 1892 Hawaii Sess. Laws 68, which declared "[a]ll roads, alleys, streets . . . built by the Government or by private parties, and dedicated or abandoned to the public as a public highway . . . . to be public highways." In the case of In re Application of Kelley, 50 Hawaii 567, 579, 445 P.2d 538, 546 (1968), that law was construed to mean that highways built by private parties prior to 1892 did not require a formal act of acceptance by government to become public highways but that a formal act of acceptance was required after the enactment of the statute.

The Highways Act of 1892 initially provided further that the ownership of all public highways shall be in the Hawaiian Government in fee simple. As a result, even properties acquired by the counties for highway purposes, whether by eminent domain, purchase, dedication, or surrender were acquired in the name of the Territory and, subsequently, in the name of the State. Even Act 142, 1947 Hawaii Sess. Laws 251, required that dedications of private roads were to name "the Territory as Grantee," although the deed was to be delivered to and accepted by the board of supervisors of the county. It was not until the passage of Act 190, 1963 Hawaii Sess. Laws 235, that section 142-2, Revised Laws of Hawaii 1955 (now section 264-2, Hawaii Revised Statutes), was amended and the ownership of these county highways was transferred to and vested in the respective counties as a matter of law and dedications to the various counties were authorized. House Standing Committee Report No. 964, reprinted in Hawaii House Journal 849-50 (1963), pertaining to Senate Bill No. 585 (Act 190), states clearly that the purpose of the act is to allow the counties to use or dispose of any abandoned public road and to retain the proceeds therefrom, inasmuch as the counties were required to maintain such public highways and to use their own funds in the purchase of these highways.

Act 221, 1965 Hawaii Sess. Laws 338 (amending section 142-2, Revised Laws of Hawaii 1955), went even further by transferring and vesting the ownership of all county highways in the respective counties, without reference to whether the highways were acquired by the counties by eminent domain, purchase, or otherwise. House Standing Committee Report No. 84, reprinted in Hawaii House Journal 541-42 (1965), reflected the intent to transfer the ownership of all county highways to the counties because it was inequitable to have the State retain ownership of those county highways.

The foregoing clearly indicates that the counties are the owners of the county highways within their boundaries. These are defined, in section 264-1, to be all public highways other than state or federal-aid highways under the jurisdiction of the Department of Transportation or designated for inclusion in the State Highway System under section 264-41, Hawaii Revised Statutes. Section 264-1 was interpreted in Santos v. Perreira, 2 Hawaii App. 387, 390, 633 P.2d 1118, 1122 (1981), to mean that public highways are not state highways unless they are included in the State Highway System under section 264-41, Hawaii Revised Statutes, and that all other public highways are county highways.

Notwithstanding the foregoing, the counties are apparently resisting their responsibility under the law to maintain public highways which they claim to be owned by the State. On the basis of the foregoing analysis, we opine that the maintenance of Wahinepee Street, Alaiki Street, Laumilo Street, and Hinalea Street is the responsibility of the City and County of Honolulu.

Wahinepee Street was built by a private party prior to 1892 and became a public highway under the Highways Act of 1892. The portion of Wahinepee Street, widened in 1935 by using Territorial lands, is a public highway. Since it is not under the jurisdiction of the Department of Transportation (DOT), it is a county highway under section 264-1 and is owned by the City under section 264-2.

With respect to the portions of Alaiki and Laumilo Streets, on government lands, they are public highways which are not under the jurisdiction of the Department of Transportation and are thereby county highways pursuant to section 264-1, cwnership and maintenance of which are the City's responsibilities pursuant to sections 264-2 and 265A-1. As to the portions on Hawaiian Home Lands, we are of the opinion these are still county highways under section 264-1, but title is not transferred to the county by section 264-2, because Hawaiian Home Lands are not transferable by state legislation, pursuant to sections 2 and 3 of article XII (designated as article XI in 1965) of the Hawaii State Constitution. They are nevertheless to be maintained by the City and County of Honolulu.

If Hinalea Street is similar to Alaiki and Laumilo Streets our conclusions would be similar.

To summarize we submit that the streets referred to above are all county highways under section 264-1, and Santos v. Perreira, 2 Hawaii App. 387, 390, 633 P.2d 1118, 1122 (1981). They are, therefore, maintainable by the City under section 265A-1. In addition, title to those public highways, except those portions on Hawaiian Home Lands, is in the City and the City is thus responsible for maintenance by virtue of its ownership as well as section 265A-1.

Very truly yours,

Arthur T. Murakami
Deputy Attorney General

ATM:jn

APPROVED:

Corinne K. A. Watanabe
Attorney General

Op. No. 86-15

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

FRANK F. FASI
MAYOR

BARRY CHUNG
CORPORATION COUNSEL

April 29, 1977

MEMORANDUM

TO : HENRY H. NAKAGAWA, CHIEF
DIVISION OF LAND SURVEY AND ACQUISITION

FROM : WINSTON K. Q. WONG, DEPUTY CORPORATION COUNSEL

SUBJECT: OWNERSHIP OF CERTAIN ROADS IN WAIANAE

This is in response to your written inquiry of December 16, 1975 as to whether or not your title abstractor was correct in stating that the roads on the attached search are under the City's jurisdiction.[1]

We answer in the negative.

The roads that are in question were originally government (Crown) land, then government (Territorial) land, and finally government (State) land upon Statehood. Under HRS Section 264-1, public highways or roads are of two types: (1) state or federal aid or (2) county highways. Since the roads here are not only owned but also built by the State, this section mandates that they are under State jurisdiction. This conclusion appears to be further supported by HRS Section 264-2, which states in part:

> The governor may, at anytime by executive order, turn over to any county, state land, in fee simple, for use as a county highway, and the county involved shall thereafter be responsible for its repair and maintenance as a county highway.

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[1]Revised to couch question in more general terms.

M 77-35

MEMORANDUM

TO: HENRY H. NAKAGAWA, CHIEF
DIVISION OF LAND SURVEY
AND ACQUISITION -2- April 29, 1977

Because there has been no executive order by the Governor turning over any of said State land to the City and County of Honolulu, the State still has ownership of the roads in question.

Although under HRS Section 265-2, the State may enter into agreements with the City to maintain highways or roads under State jurisdiction, there is no such agreement regarding these roads. Therefore, any maintenance by the City was strictly voluntary and such maintenance does not place such roads under City's jurisdiction.[2]

Winston K. Q. Wong
WINSTON K. Q. WONG
Deputy Corporation Counsel

APPROVED:

Barry Chung
BARRY CHUNG
Corporation Counsel

WKQW:ele

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[2]Traffic control may be placed on the subject roads by the City pursuant to HRS Section 70-63, if necessary for the safety of motorists and pedestrians using the subject roads.

CHAPTER III

STATISTICAL TABLES*

TABLE 1

NUMBER AND TYPES OF INQUIRIES

Fiscal Year 1986-1987

Month	Total Inquiries	No Jurisdiction	Information	Complaint
July.....	419	37	118	264
August.....	359	27	86	246
September...	401	43	91	267
October.....	404	20	109	275
November....	345	19	91	235
December....	371	45	79	247
January.....	417	31	108	278
February....	354	32	97	225
March.....	395	25	137	233
April.....	378	26	98	254
May.....	393	28	102	263
June.....	413	21	106	286
TOTAL.....	4,649	354	1,222	3,073
% OF TOTAL INQUIRIES...	100.0%	7.6%	26.3%	66.1%

*Totals may not add up to 100.0% due to rounding.

TABLE 2

MEANS BY WHICH INQUIRIES ARE RECEIVED

Fiscal Year 1986-1987

Month	Written	Phone	Visit
July.....	22	381	16
August.....	28	321	10
September.....	29	358	14
October.....	23	374	7
November.....	14	324	7
December.....	22	336	13
January.....	29	384	4
February.....	21	324	9
March.....	27	361	7
April.....	13	352	13
May.....	15	364	14
June.....	23	378	12
TOTAL.....	266	4,257	126
% OF TOTAL INQUIRIES..... (4,649)	5.7%	91.6%	2.7%

TABLE 3

DISTRIBUTION OF POPULATION AND
INQUIRERS BY RESIDENCE

Fiscal Year 1986-1987

	Population*	Percent of Total Population	Total Inquiries	Percent of Total Inquiries
County				
City and County of Honolulu..	814,600	77.3%	3,792	81.6%
Hawaii County..	109,200	10.4%	374	8.0%
Maui County....	85,300	8.1%	358	7.7%
Kauai County...	44,800	4.2%	91	2.0%
Out-of-State.....	--	--	34	.7%
TOTAL.....	1,053,900	100.0%	4,649	100.0%

*Source: The State of Hawaii Data Book 1986, A Statistical Abstract, Hawaii State Department of Planning and Economic Development, Table 5, "Resident Population, by Counties: 1970 to 1985."

TABLE 4

DISTRIBUTION OF TYPE OF INQUIRIES BY
RESIDENTS OF VARIOUS COUNTIES FOR FISCAL YEAR 1986-1987

County	Type of Inquiry					
	No Jurisdiction		Information		Complaint	
	Number	Percent of Total	Number	Percent of Total	Number	Percent of Total
City and County of Honolulu	287	81.1%	1,043	85.4%	2,462	80.1%
Hawaii County	18	5.1%	57	4.7%	299	9.7%
Maui County	36	10.2%	82	6.7%	240	7.8%
Kauai County	8	2.3%	24	2.0%	59	1.9%
Out-of-State	5	1.4%	16	1.3%	13	.4%
TOTAL	354	100.0%	1,222	100.0%	3,073	100.0%

TABLE 5

CITY AND COUNTY OF HONOLULU

Means of Receipt and Type of Inquiries by Month
During Fiscal Year 1986-1987

Month	Total Inquiries	Means of Receipt			Type of Inquiry		
		Written	Phone	Visit	No Jurisdiction	Information	Complaint
July.....	342	20	311	11	28	102	212
August.....	306	27	270	9	23	77	206
September.....	319	26	288	5	30	76	213
October.....	337	21	310	6	15	87	235
November.....	282	12	264	6	16	78	188
December.....	292	17	266	9	39	61	192
January.....	326	11	313	2	21	105	200
February.....	302	17	277	8	28	86	188
March.....	342	25	315	2	20	121	201
April.....	300	8	287	5	26	81	193
May.....	318	11	296	11	24	76	218
June.....	326	17	302	7	17	93	216
TOTAL.....	3,792	212	3,499	81	287	1,043	2,462
% OF TOTAL....	100.0%	5.6%	92.3%	2.1%	7.6%	27.5%	64.9%

TABLE 6

NEIGHBOR ISLAND COUNTIES AND OUT-OF-STATE

Means of Receipt and Type of Inquiries
During Fiscal Year 1986-1987

County	Total Inquiries	Means of Receipt				Type of Inquiry		
			Phone					
		Written	LD	Local	Visit	No Jurisdiction	Information	Complaint
Hawaii.....	374	13	326	16	19	18	57	299
% of County.....	100.0%	3.5%	87.2%	4.3%	5.1%	4.8%	15.2%	79.9%
Maui.....	358	25	300	21	12	36	82	240
% of County.....	100.0%	7.0%	83.8%	5.9%	3.4%	10.1%	22.9%	67.0%
Kauai.....	91	3	67	8	13	8	24	59
% of County.....	100.0%	3.3%	73.6%	8.8%	14.3%	8.8%	26.4%	64.8%
Out-of-State.....	34	13	16	4	1	5	16	13
% of County.....	100.0%	38.2%	47.1%	11.8%	2.9%	14.7%	47.1%	38.2%
TOTAL.....	857	54	709	49	45	67	179	611
% of County.....	100.0%	6.3%	82.7%	5.7%	5.3%	7.8%	20.9%	71.3%

LD = Long Distance
LOCAL = Inquiries received by staff member during visit to a neighbor island

TABLE 7

COMPLAINT DISPOSITION

Fiscal Year 1986-1987

State Departments	Total Complaints	Complaints Investigated		Discontinued	Pending
		Not Sustained	Sustained or Partially Sustained		
Accounting and General Services...	34	15	6	10	3
Agriculture.....	15	10	1	2	2
Attorney General.....	39	12	8	11	8
Budget and Finance.....	46	17	13	15	1
Commerce and Consumer Affairs.....	77	35	9	21	12
Defense.....	1	0	1	0	0
Education.....	74	21	23	23	7
Hawaiian Home Lands.....	6	1	2	3	0
Health.....	80	39	11	20	10
Labor and Industrial Relations....	67	33	10	23	1
Land and Natural Resources.....	46	19	12	9	6
Personnel Services.....	17	9	4	3	1
Planning and Economic Development.	2	2	0	0	0
Social Services and Housing.....	2,254	688	393	1,030	143
Taxation.....	39	12	11	14	2
Transportation.....	85	25	18	28	14
University of Hawaii.....	26	9	3	13	1
Other Executive Agencies.....	1	1	0	0	0
Counties					
City and County of Honolulu.....	86	35	13	32	6
County of Hawaii.....	33	19	0	8	6
County of Maui.....	25	7	4	9	5
County of Kauai.....	20	9	4	5	2
TOTAL.....	3,073	1,018	546	1,279	230
% OF TOTAL COMPLAINTS (3,073)....	100.0%	33.1%	17.8%	41.6%	7.5%
% OF TOTAL INQUIRIES (4,649).....	66.1%	21.9%	11.7%	27.5%	4.9%

TABLE 8

SUSTAINED COMPLAINT DISPOSITION

Fiscal Year 1986-1987

State Departments	Sustained or Partially Sustained	Rectified	No Action Necessary
Accounting and General Services	6	6	0
Agriculture	1	1	0
Attorney General	8	7	1
Budget and Finance	13	11	2
Commerce and Consumer Affairs	9	7	2
Defense	1	1	0
Education	23	18	5
Hawaiian Home Lands	2	2	0
Health	11	10	1
Labor and Industrial Relations	10	10	0
Land and Natural Resources	12	11	1
Personnel Services	4	4	0
Planning and Economic Development	0	0	0
Social Services and Housing	393	370	23
Taxation	11	9	2
Transportation	18	18	0
University of Hawaii	3	3	0
Other Executive Agencies	0	0	0
Counties			
City and County of Honolulu	13	12	1
County of Hawaii	0	0	0
County of Maui	4	4	0
County of Kauai	4	4	0
TOTAL	546	508	38
% OF TOTAL SUSTAINED COMPLAINTS (546)	100.0%	93.0%	7.0%
% OF TOTAL COMPLAINTS (3,073)	17.8%	16.5%	1.2%
% OF TOTAL INQUIRIES (4,649)	11.7%	10.9%	.8%

TABLE 9

INFORMATION INQUIRIES

Fiscal Year 1986-1987

	Number of Inquiries	Percent of Total
Departments		
Accounting and General Services.....	17	1.4%
Agriculture.....	8	.7%
Attorney General.....	20	1.6%
Budget and Finance.....	29	2.4%
Commerce and Consumer Affairs.....	246	20.1%
Defense.....	0	0%
Education.....	9	.7%
Hawaiian Home Lands.....	2	.2%
Health.....	36	2.9%
Labor and Industrial Relations.....	53	4.3%
Land and Natural Resources.....	28	2.3%
Personnel Services.....	6	.5%
Planning and Economic Development...	11	.9%
Social Services and Housing.....	86	7.0%
Taxation.....	21	1.7%
Transportation.....	36	2.9%
University of Hawaii.....	5	.4%
Other Executive Agencies	6	.5%
Counties		
City and County of Honolulu.....	105	8.6%
County of Hawaii.....	9	.7%
County of Maui.....	6	.5%
County of Kauai.....	2	.2%
Miscellaneous.....	481	39.4%
TOTAL.....	1,222	100.0%

TABLE 10

NO JURISDICTION EXCLUSION

Fiscal Year 1986-1987

Exclusions	Number of Inquiries	Percent of Total
Courts or Cases in Court.....	148	41.8%
Legislature, Committees or Staff...	8	2.3%
Entity of the Federal Government...	32	9.0%
Governor or Personal Staff.....	6	1.7%
Lt. Governor or Personal Staff.....	4	1.1%
Mayors.....	2	.6%
County Councils.....	3	.8%
Collective Bargaining.....	15	4.2%
Private Transaction.....	136	38.4%
TOTAL.....	354	100.0%

TABLE 11

INQUIRIES CARRIED OVER TO FISCAL YEAR 1986-1987 AND THEIR DISPOSITIONS, AND INQUIRIES CARRIED OVER TO FISCAL YEAR 1987-1988

	Inquiries Carried Over to FY 86-87	Inquiries Carried Over to FY 86-87 and Closed During FY 86-87	Balance of Inquiries Carried Over to FY 86-87	Inquiries Received in FY 86-87 and Pending	Total Inquiries Carried Over to FY 87-88
Type of Inquiry					
No Jurisdiction	0	0	0	2	2
Information	0	0	0	4	4
Complaint	295	229	66	230	296
		Disposition of Complaints			
		Justified 81			
		Unjustified 104			
		Discontinued 44			
		229			
TOTAL	295	229	66	236	302

CHAPTER IV

SELECTED CASE SUMMARIES

The following are selected summaries of cases handled by the office during the last fiscal year. Each case summary has been included under the State government department or the county government which was involved in the complaint or inquiry, or against which the complaint was registered. Although some cases involved more than one department or involved both the State and the county levels of government, we have included each summary under the most appropriate State agency or level of government. Under each agency or government, case summaries are arranged numerically by case number.

Abbreviations

Department of Accounting and General Services (DAGS)
Department of Agriculture (DOA)
Department of the Attorney General (AG)
Department of Budget and Finance (B&F)
Department of Commerce and Consumer Affairs (DCCA)
Department of Defense (DOD)
Department of Education (DOE)
Department of Hawaiian Home Lands (DHHL)
Department of Health (DOH)
Department of Labor and Industrial Relations (DLIR)
Department of Land and Natural Resources (DLNR)
Department of Personnel Services (DPS)
Department of Planning and Economic Development (DPED)
Department of Social Services and Housing (DSSH)
Department of Taxation (TAX)
Department of Transportation (DOT)
University of Hawaii (UH)
City and County of Honolulu (C&C)
Hawaii Revised Statutes (HRS)
Hawaii Administrative Rules (HAR)

TABLE OF CONTENTS

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

(87-2445) Retroactive application of Medicare portion of Federal Insurance Contributions Act (FICA) tax. A former State employee complained that she received a notice from the DAGS that she owed $75.18 for the Medicare portion of the FICA tax on her earnings from April 1986 through September 1986. The complainant was employed by the State as an emergency appointee from October 1985 through September 1986. Since she was an emergency appointee, the FICA tax was not deducted from her paychecks.

Upon our inquiry, the DAGS informed us that the Consolidated Omnibus Budget Reconciliation Act of 1986, known as COBRA, required the collection of the Medicare portion of the FICA tax from employees who were otherwise not covered by social security and who were hired after March 31, 1986. Thus, the collection of the tax from emergency appointees was required. The DAGS also informed us that because of late notification, the deduction of the Medicare portion of the FICA tax from all emergency appointees' earnings, which should have begun in April 1986, did not begin until October 1986. Thus, taxes from wages earned from April through September 1986 had to be retroactively collected.

After discussing the application of the COBRA with the Employees' Retirement System (ERS), the B&F, and the DPS, and after reviewing provisions of the COBRA and informational releases prepared by the Social Security Administration, we confirmed that the Medicare portion of the FICA tax should be deducted from the earnings of emergency appointees who were appointed after March 31, 1986.

We also noted that section 76-31, HRS, limited the period of an emergency appointment to not more than 30 days. When we discussed the matter with the DAGS, the ERS, and the former employing agency of the complainant, we were informed that an emergency appointee could receive more than one 30-day appointment but there must be a break in service of at least a day between each 30-day period. Each 30-day period is then regarded as a new appointment. Thus, the complainant's employment during the period from October 1985 through September 1986 was a series of 30-day appointments separated by breaks in service between appointments.

Since the Medicare portion of the FICA tax was to be collected from employees appointed after March 31, 1986, we asked the complainant's former employer to explain how her tax was calculated for the month of April 1986. The agency reported that the complainant's first 30-day emergency appointment after March 31, 1986 began on April 28, 1986. Thus, although the complainant's previous emergency appointment included the period from April 1 to April 27, she was not assessed the Medicare portion of the FICA tax for that period because that period was part of a 30-day emergency appointment which began prior to March 31, 1986. The agency reported that the $75.18 the complainant owed was computed for the period commencing April 28, 1986 and furnished us with a copy of its written calculations.

We informed the complainant of the provisions of the COBRA and the manner in which the amount she owed was calculated. The complainant thanked us for our investigation.

DEPARTMENT OF AGRICULTURE

(86-1847) Coverup of pesticide misuse by inspector. A resident of an apartment complex complained that an inspector at the Pesticides Branch, DOA, attempted to cover up an incident of pesticide misuse. The complainant informed us that the day after the exterior of his apartment complex was treated with pesticide, he complained to the DOA that the pesticide was used improperly and that as a result, he and other residents became ill. The complainant alleged that when the DOA inspector interviewed him the next day, the inspector refused to test samples of the pesticide collected in garbage bags by the complainant and, in so refusing, the inspector attempted to cover up the incident.

When we contacted the DOA on this matter, we were informed that the DOA was in the process of investigating the complaint and that appropriate corrective action would be taken upon completion of the investigation.

Upon completion of the investigation, we reviewed the DOA's findings and conclusions. We learned that the DOA refused to accept the samples of pesticide collected by the complainant because the DOA must follow strict procedures in the collection of samples in its investigation of pesticide complaints. We were informed that in accordance with U. S. Environmental Protection Agency procedures, DOA investigators are required to personally collect samples used in DOA investigations. We also learned that samples are tested when pesticides used need to be identified. In this instance, the pesticide used was identified through other means so the testing of samples was not necessary.

We also learned that on the day the DOA initially interviewed the complainant, the DOA also contacted other residents of the apartment complex and none complained of suffering any illness as a result of the pesticide application. A few weeks later, the DOA received a letter from an elected representative of the area indicating that other residents from the apartment complex reported suffering illnesses as a result of the pesticide application. The DOA contacted the individuals named by the representative and other residents for information regarding their symptoms. This information was thereafter transmitted to the DOH for medical evaluation.

After reviewing the information, the DOH informed the DOA that the information provided was not adequate to confirm a diagnosis of pesticide poisoning and in some cases it appeared that the reported symptoms may have been caused by an influenza-type illness that was reported in the area during that period of time. The DOH also recommended several precautionary measures to reduce the exposure of residents in future pesticide applications.

The DOA subsequently disseminated the information received from the DOH to the individuals affected and communicated the precautionary recommendations of the DOH to the appropriate parties. In addition, based on its investigation, the DOA imposed a civil penalty against the pest control operator for not taking appropriate precautions to insure that adults, children, and pets

were kept out of the treated areas until the pesticide dried, in accordance with the pesticide label directions, and for operating faulty spraying equipment on the job.

We subsequently informed the complainant that we found the DOA's actions to be reasonable.

(86-2437) Beef kept in commercial cold storage improperly stamped by agriculture employees. A complainant sent us a copy of his letter to an administrator of the Meat Inspection Branch, DOA, complaining that DOA staff members improperly stamped "Not for Sale" on his beef carcass that was in a cold storage facility. In his letter the complainant requested to be informed of the statutes that authorized the DOA to take such action. The DOA administrator responded with general references to State laws and Federal regulations covering the DOA's enforcement responsibilities.

As we were in the process of reviewing the references the complainant received from the DOA, we learned the complainant wrote to the DOA director requesting a review of the actions taken by the DOA staff. The director responded that the complaint would be reviewed and that the complainant would be informed of the DOA's findings and conclusions. The director consulted with the AG and thereafter informed the complainant that the DOA staff did not have specific authority to stamp his carcass and they were instructed to cease such activity.

The director's response appeared to resolve the complaint and we so notified the complainant.

DEPARTMENT OF THE ATTORNEY GENERAL

(86-3538) Denial of tort claim. An inmate complained that the AG unfairly denied his tort claim. He informed us that the facility confiscated his store order items during a shakedown and when the items were returned, a case of soda, one writing tablet, and 35 packs of cigarettes were missing. After the facility informed him the items could not be found, the inmate filed a tort claim for reimbursement for these items, which the AG denied.

In the course of our investigation, we reviewed the AG's file on the inmate's tort claim. In the tort claim, the inmate claimed that on December 6, 1985 he received items he ordered costing $30.90. A store order ticket submitted with the tort claim identified the items purchased and specified their costs. According to the store order ticket, however, the total cost for the items purchased was only $27.30. The ticket confirmed that the inmate ordered and received a case of soda but did not confirm any order for cigarettes. A correctional facility inter-unit request form was also included with the tort claim, wherein the inmate reported missing 45 packs of cigarettes after the shakedown, 10 more packs than claimed in the inmate's tort claim.

Due to the inconsistencies in the information regarding the amount of cigarettes and the value of the items, the AG determined that the entire claim was in question and therefore denied it.

Since there was documentation that verified the purchase of the case of soda, we requested that the AG reconsider the inmate's claim for the soda. Thereafter, the AG proposed a monetary settlement of $9.60, the cost the inmate paid for the case of soda, and the inmate accepted the proposed settlement.

DEPARTMENT OF BUDGET AND FINANCE

(86-1817) Nonreceipt of reimbursement of Federal Insurance Contributions Act (FICA) withholdings. A State employee complained of not receiving a reimbursement for FICA taxes which were withheld from her sick leave pay from 1976 to 1981.

Under the FICA, a tax is imposed upon an employee's wages and the employee and the employee's dependents or survivors become eligible for social security benefits upon the employee's attainment of a certain age or upon disablement or death. In a memorandum dated April 2, 1984, the Governor informed all department heads that the Social Security Administration (SSA) approved the filing of claims for the refund of FICA taxes erroneously withheld from employees' sick leave pay for the period from January 1, 1976 through December 31, 1981. The deadline for filing claims was October 15, 1985. A private firm was retained to review sick leave data, compute the amount of reimbursement due each eligible employee, prepare claims to the SSA, and process reimbursement checks to employees. The Governor's memorandum directed the departments to cooperate and assist the private firm in its review of agency sick leave and personnel records. The Employees' Retirement System (ERS) coordinated the reimbursement efforts.

In our investigation, we learned that the private firm did not file a claim to the SSA on behalf of the complainant because her personnel records could not be located. The firm had contacted the employee's department on numerous occasions to obtain her sick leave records but the department could not find the records. When the records were eventually located, the deadline for filing claims had expired.

The department and the ERS acknowledged that the complainant was not responsible for the problem, and thus the department made arrangements to reimburse the complainant from departmental funds. We subsequently confirmed the complainant's receipt of her reimbursement check.

(87-3477) Delay in refund. A retiree complained about a delay in receiving a refund of the balance of his accumulated contributions from the Employees' Retirement System of the State of Hawaii (ERS).

In our review, we learned that when a member of the ERS elects a mode of retirement allowance which entitles the member to receive a lump sum payment of all or part of the member's accumulated contributions, the ERS pays to the member, as soon as possible after retirement, the accumulated contributions credited to the member on the member's current ledger printout. Subsequently, after final payroll information and audited data on vacation and sick leave credits become available, the balance of the member's accumulated contributions is calculated by a claims examiner and that balance is then paid to the member.

In this case, the complainant had not received payment of the balance of his accumulated contributions. The ERS explained that the senior claims examiner discovered an error in the claims examiner's calculations of the balance due to the complainant and returned the calculations to the claims examiner for correction. The claims examiner, however, put the matter aside due to the urgency of other work. The ERS apologized for the delay, prioritized the complainant's case, and processed the payment soon thereafter.

DEPARTMENT OF EDUCATION

(85-3720) Unkempt buildings on school property. A neighborhood resident complained that several unoccupied buildings on the campus of a nearby public school were deteriorated and hazardous.

Upon our inquiry, DOE officials acknowledged the poor condition of the buildings and also noted that students were loitering there. They reported, however, that the buildings were under the jurisdiction of the Oahu Civil Defense Agency (Civil Defense), C&C. When we contacted the Civil Defense deputy director designate (deputy director), he informed us that $11,000 had been appropriated for the removal of the structures but less expensive alternatives for remedying the problem were being explored at the time. Since the efforts would take time, we inquired about the possibility of securing the buildings in the meantime. The deputy director expressed his reluctance to secure the buildings due to the substantial cost but agreed to review the matter further.

The deputy director later reported that during his further review, a question arose as to whether the structures were the joint responsibility of the DOE and the Civil Defense. He explained that the National Guard erected the buildings in 1948 and occupied them until 1962. The buildings were then officially turned over to the C&C which, at that time, was responsible for the construction and maintenance of school facilities. Thereafter, Act 97, 1965 Hawaii Sess. Laws 116, transferred the responsibility for construction and maintenance of all school structures to the State. The State reportedly used the buildings until about the mid-1970s to store medical supplies and one building was currently used to store school furniture.

By written inquiry to the Civil Defense and the DOE, we requested that they determine the agency responsible for securing and/or demolishing the buildings. The deputy director responded that although the C&C did not feel the buildings were its responsibility, as an interim solution the C&C would immediately secure the structures due to concern for the safety of the students on the campus. He also informed us of his intent to meet with the DOE.

Civil Defense and DOE officials met thereafter and the DOE acknowledged its responsibility for the structures. The DOE found that the buildings were hazardous and that repair of the buildings for further use was not feasible. Consequently, the DOE notified us of its intent to demolish the structures.

We monitored the DOE's efforts until the buildings were demolished and then notified the complainant of the demolition.

DEPARTMENT OF HEALTH

(86-236) Competitive bidding for pharmaceutical services. We received a complaint that the DOH contracted with a private company to provide pharmaceutical services at a State hospital without utilizing the competitive bidding process.

In our investigation, we learned that as a pilot project, the DOH entered into an Agreement for Pharmacy Services (hereinafter "Agreement") with a private company (Contractor), wherein the Contractor agreed to maintain, operate, and manage a pharmacy at a State hospital (Hospital) and to reimburse the Hospital for the salary and fringe benefits of the State pharmacist working in the Hospital pharmacy and for the drugs used by the Contractor from the Hospital's inventory of drugs. In turn, the DOH agreed, for a monthly fee, to furnish the contractor a 700-square foot pharmacy area including customary utility, telephone and janitorial services. The DOH also agreed that the Contractor could charge the "usual and customary fees" to any patient referred to the Contractor by the DOH for pharmacy services. We also learned that during the term of the Agreement, the DOH permitted the Contractor to provide pharmacy services for a fee to patients of the Hospital and other public and private institutions and programs.

In our review of the matter, we noted that Chapter 102, HRS, entitled "Concessions on Public Property," provided in relevant part:

> §102-1 Definition. The word "concession" as used in this chapter means the grant to a person of the privilege to conduct operations which are essentially retail in nature, involving the sale of goods, wares, merchandise, or services to the general public, such as restaurants, cocktail lounges, soda fountains, and retail stores in or on buildings under the jurisdiction of any government agency.

§102-2 Contracts for concessions; bid required, exception. (a) Except as otherwise specifically provided by law, no concession or concession space shall be leased, let, licensed, rented out, or otherwise disposed of either by contract, lease, license, permit or any other arrangement, except under contract let after public advertisement for sealed tenders in the manner provided by law; provided that the duration of the grant of the concession or concession space shall be related to the investment required but in no event to exceed fifteen years.

(Emphases added).

Thus, we inquired with the DOH as to whether the DOH complied with the bidding requirements of Chapter 102, HRS, before entering into the Agreement. The DOH responded in the negative and explained that the operation of the Contractor under the Agreement was not subject to the bidding requirements of Chapter 102, HRS, because the operation was not a "concession" as defined in section 102-1, HRS.

Thereafter, we inquired with the AG as to whether the bidding requirements of Chapter 102, HRS, were applicable to the arrangement between the DOH and the Contractor under the Agreement. The AG responded that the matter was moot as the Agreement with the Contractor was terminated a month after our inquiry with the AG. The AG also informed us that before terminating the Agreement, the DOH publicly solicited bids in the newspaper for the same services provided by the Contractor under the Agreement. As the Contractor was the sole respondent to the solicitation for bids, the DOH awarded the contract to the Contractor.

Although we were unable to definitively settle the issue of whether the arrangement between the Contractor and the DOH was subject to Chapter 102, HRS, we were satisfied that the DOH's solicitation for bids afforded interested parties an opportunity to compete for the contract.

We advised the complainant of the solicitation for bids.

(86-2829) Billing for ambulance services. A parent complained that the DOH referred to a collection agency a bill for emergency ambulance service provided to her son. The complainant contended that the referral was improper because she was not previously notified of the outstanding bill. When the complainant inquired about this matter, the billing service that referred the bill to the collection agency admitted the referral was erroneous and apologized. The complainant was concerned, however, that the erroneous referral might jeopardize her credit rating.

In our investigation, the DOH informed us that the billing service was contracted by the DOH to process billings for emergency ambulance service. The DOH explained that when the post office returns undeliverable bills which the billing service mailed out, the billing service attempts to identify the correct

address of the person responsible for the bill. In this case, however, it appeared the billing service did not attempt to ascertain the correct address before referring the bill to the collection agency. The DOH also informed us that neither the billing service nor the collection agency reports delinquent accounts to any credit rating or credit reporting agency.

We informed the complainant of the DOH's response. She was satisfied with the response.

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

(82-113) State Fire Council Rules of Practice and Procedures. A caller inquired as to where she could procure a copy of the State Fire Council's (Fire Council) Rules of Practice and Procedures.

In attempting to obtain the information for the inquirer, we learned that Act 241, 1978 Hawaii Sess. Laws 507, abolished the Office of the State Fire Marshal; transferred the functions and responsibilities of the State Fire Marshal to the respective counties; placed all functions relative to the protection of persons and property against fire loss with the respective County governments; and established the Fire Council, comprised of the fire chiefs of the counties and the chief of the Fire Prevention Bureau of the C&C. The Act required that the Fire Council, among other duties, adopt a State model fire code (Code) pursuant to section 132-3, HRS. Section 132-3, HRS, required that the Code be adopted pursuant to Chapter 91, HRS, and that upon its adoption, the Code be transmitted to the respective County councils which could, by ordinance, enact the Code's provisions, enact more stringent provisions relating to the protection of persons and property against fire loss, or enact less stringent provisions with the prior written approval of the Fire Council.

We also noted that section 91-2(a), HRS, provided in part:

> In addition to other rulemaking requirements imposed by law, each agency shall:
>
> . . . .
>
> (2) Adopt rules of practice, setting forth the nature and requirements of all formal and informal procedures available, and including a description of all forms and instructions used by the agency.

Upon our inquiry, the chairman of the Fire Council informed us that rules of practice and procedures had not been adopted, but the Fire Council had nonetheless adopted the Code after public hearings in accordance with Chapter 91. We brought section 91-2(a), HRS, to the attention of the chairman and inquired

whether the Fire Council was an "agency" as defined by Chapter 91, HRS, and whether section 91-2, HRS, required the Fire Council to adopt rules of practice and procedures to govern its proceedings.

Since the Fire Council did not have its own staff and legal counsel and the chairman was the fire chief of the C&C, the chairman referred our inquiry to the C&C's Department of the Corporation Counsel (Corporation Counsel).

The Corporation Counsel concluded that the Fire Council is an agency and is required to adopt rules of practice and procedures. The Corporation Counsel also advised the Fire Council, as it is a State agency, to seek the AG's assistance in drafting the rules.

Upon reviewing Chapter 132, HRS, the AG discovered that the Legislature had not assigned the Fire Council to a principal State department as required by the Constitution of the State of Hawaii. Thus, the Fire Council and the AG worked together toward submitting legislation to correct the oversight. Subsequently, Act 103, 1985 Hawaii Sess. Laws 182, placed the Fire Council within the DLIR for administrative purposes.

Thereupon, the Fire Council promulgated Chapter 12-44 of the HAR, entitled "State Fire Council Rules of Practice and Procedures," effective June 6, 1986.

DEPARTMENT OF LAND AND NATURAL RESOURCES

(80-1255) Encroachment on State land. We received a complaint that after receiving reports that a beachfront property owner was building a seawall without a building permit and that the wall encroached on State land, the DLNR and the C&C Building Department (BD) were unable to determine which agency was responsible for investigating the matter and taking corrective action.

In our investigation, we were informed that after extensive investigation which included a field survey, the DLNR assumed responsibility for the matter. We were also informed that from the DLNR's investigation it appeared that in addition to the subject seawall, a number of seawalls erected by adjacent property owners also encroached on State land.

After lengthy discussion between the staff of the DLNR and the AG, the Board of Land and Natural Resources addressed all the violations on a case-by-case basis. With respect to the instant case, the Board took the following actions:

(1) Imposed a fine;

(2) Assessed a monthly rental charge retroactive to the date of occupancy of the State land;

(3) Set a deadline for the filing of an after-the-fact application for permission to construct a wall on State land;

(4) Approved the application, subject to certain conditions; and

(5) Offered an easement for the wall subject to certain conditions.

Adjacent property owners who had erected seawalls encroaching on State property were similarly fined, assessed rental charges, and afforded the opportunity to obtain an easement.

The complainant was apprised of the action that the DLNR eventually took on the complaint.

(87-1505) Public notice for fishing season at Nuuanu Reservoir. A recreational fisherman complained about the lack of public notice of the November opening of the Nuuanu Freshwater Fish Refuge (Fish Refuge) for fishing. The Fish Refuge is usually open three times a year to the public for freshwater fishing. At other times of the year, fishing is not allowed.

The complainant informed us that prior to the November opening, he waited for a notice to appear in the newspaper but none was printed. He then inquired with the DLNR and learned that since the application period for a permit had elapsed, he would not be able to fish during the November opening.

We contacted the Fisheries Branch (FB) of the Aquatic Resources Division (ARD) and learned that the opening of the Fish Refuge to the public for fishing is scheduled for the same three months every year--May, August, and November. The permit application period, which is about three weeks long, occurs during the month preceding the opening. At the end of the application period, a public drawing is held to assign each applicant a fishing date and time.

For the November opening, the DLNR issued a news release on September 29, 1986. The application period was from September 29 until October 17, 1986. The drawing to assign fishing dates and times was held on October 22. The complainant inquired with the DLNR after the public drawing and could not be accommodated.

We inquired with the FB whether the announcement of the November opening was printed in the major daily newspapers. The FB informed us that the September 29 news release, as usual, was sent to the newspapers, television and radio stations, and to fishing supply stores. However, because the DLNR did not pay for any media announcements, it could not insist that such anouncements be published or aired. After further investigation, the FB informed us that it believed an announcement concerning the November opening was not printed in the newspapers. The FB was also not aware of any announcement made on television or radio.

We found no law or rule requiring a public announcement of each open fishing period. However, we inquired with the ARD as to whether a paid public announcement would be appropriate. The ARD chief concluded that an announcement in the newspapers would be appropriate, and after consulting with the DLNR chairperson, he informed us that the DLNR would pay for the publication of a

notice in the newspapers to ensure that such announcement would be printed for the upcoming May opening. Since the Sunday newspaper appeared to have the greatest circulation, the paid announcement would be made in a Sunday edition.

Subsequently, the ARD provided us with a copy of the public notice printed in the Sunday newspaper on March 29, 1987, announcing the May opening.

We informed the complainant of the corrective action taken by the DLNR.

DEPARTMENT OF SOCIAL SERVICES AND HOUSING

(86-1785) Minor misconduct process and sanction imposed. An inmate complained that his telephone privileges were improperly suspended for three weeks because he misused the telephone.

Upon our inquiry, the unit manager (UM) of the complainant's housing unit informed us that the suspension was imposed through the minor misconduct process established by section 17-201-11(a) of the Administrative Rules of the Corrections Division (CD Rules), which stated:

> The staff member shall inform the inmate or ward that the individual is accused of committing a minor infraction, to which the individual shall be given a brief opportunity to respond, to offer an explanation in defense, or otherwise show that the individual is not guilty of the alleged misconduct.

When we asked whether the complainant was provided the opportunity to respond to the accusation, the UM said that the complainant filed a grievance contesting his guilt which thus afforded the inmate an opportunity to respond.

We disagreed with the UM's position because section 17-201-11(a) of the CD Rules appeared to require that the complainant have an opportunity to respond to the accusation prior to a determination of guilt and prior to the imposition of a sanction. We noted that the complainant filed the grievance several days after the sanction was imposed.

In addition, we learned that although the original sanction imposed was a two-week suspension of the inmate's telephone privileges, the UM later extended the duration of the suspension to three weeks because he felt that a two-week suspension was too lenient.

According to the facility policy, however, suspensions of telephone privileges are limited to a maximum of 15 days. We brought the apparent violation of the facility policy to the attention of the program control administrator (PCA). After

review, the PCA acknowledged the violation and restored the inmate's telephone privileges. However, by that time the suspension had lasted for 20 days.

We thereafter wrote to the facility regarding the failure of the facility to give the inmate an opportunity to respond to the accusation before the sanction was imposed. We also inquired whether the facility would allow the inmate to make the telephone calls he was wrongfully deprived of during the suspension of his privileges beyond 15 days.

In a written response, the PCA and the facility administrator concurred with the UM's position that the inmate had the opportunity to respond to the accusation through the grievance process. They indicated that the inmate could also have responded in his own defense when presented with the brief written report notifying him of the violation and sanctions. Further, the PCA and facility administrator indicated that they did not consider the suspension of the inmate's telephone privileges for 20 days to constitute a grievous loss.

Since we disagreed with the response of the PCA and the facility administrator, we requested further review by the CD administrator (CDA). In response, the CDA indicated that the CD Rules do not limit the suspension of an inmate's telephone privileges to 15 days and that a 20-day suspension is not considered a grievous loss. The CDA also concurred with the facility that the inmate had the opportunity to respond to the accusation when he was presented with the brief written report notifying him of the violation and sanction.

As we disagreed with the CDA's response, we requested further review by the deputy director of the DSSH. We explained our position and noted our concern that the CDA supported actions of facility staff which appeared to violate CD Rules and facility policy.

The deputy director informed us that he agreed an error was made and instructed the CD to acknowledge the error and correct its records. The CDA in turn issued a memo to the facility administrator acknowledging that a staff error was made in not providing the inmate an opportunity to respond to the accusation prior to imposing a sanction and for imposing a 20-day suspension of the inmate's telephone privileges, five days in excess of the facility's 15-day limit. The CDA directed the facility to amend the complainant's records to reflect the error.

We thereafter asked the CDA whether the inmate would be permitted to make the number of telephone calls he missed during the five days in which his telephone privileges were wrongfully suspended. We noted that the inmate stated that he was usually allowed to make 10-minute telephone calls every other day during the period in question. To remedy the error, we suggested that the inmate be allowed to make two or three telephone calls in addition to the calls that he was usually permitted to make.

The CDA agreed the remedy we proposed was just and instructed the facility administrator to allow the inmate to make three extra telephone calls of 10 minutes each.

We informed the inmate of the corrective action to be taken and subsequently verified that he made the extra telephone calls.

(86-1976) Inadequate lighting at an elderly housing project. A resident of an elderly housing project operated by the Hawaii Housing Authority (HHA) complained about recurring thefts of batteries from cars parked in the project's parking lot. She informed us that the parking lot was divided into two areas; two opaque glass globes with low-wattage lightbulbs lit one area; and there was no lighting in the other area. She believed the theft problem could be alleviated by increasing police surveillance and improving lighting in the project's parking lot. She was also concerned that the remote location of the parking lot coupled with inadequate lighting would invite muggings of elderly residents. The complainant also complained that there were no overhead lights within the hallways of the housing project.

Upon our inquiry, an HHA project staff member informed us that the areas in question were already lighted and that the project did not have adequate funds to retain a private security service to provide surveillance in the area. The police department also informed us that police surveillance in the area could not be increased because of a severe island-wide manpower shortage.

When we brought the complainant's concerns to the attention of the HHA administration, they agreed to conduct an assessment of the lighting in the housing project. Thereafter, the HHA confirmed that lighting was deficient throughout the entire project, and when funds became available, the HHA installed additional lights throughout the housing project.

We reported our findings to the complainant who expressed understanding of the police department's manpower sho. tage predicament and her relief that lighting was improved.

(86-2775) Inmate access to the classification manual. An inmate complained that he was not allowed access to the classification manual which contained provisions for the determination of security and custody designations of all sentenced adult felons.

Staff members of the correctional facility reported that inmates were previously permitted access to the classification manual but the practice was discontinued.

Approximately two years before, in response to our inquiry, the then corrections division administrator (CDA) decided to permit inmates access to the classification manual, with the exception of a section pertaining to inmate transfers. Upon request, inmates were allowed to review the 13 sections of the classification manual which pertained to the designation of inmate security and custody levels. (See Report of the Ombudsman No. 15, case summary 84-1172 on page 76.)

We informed the current CDA of the action taken by his predecessor, noting that the point system in the classification manual was designed to objectify determinations of security and custody of inmates. At the time the system was implemented, it was anticipated that the system would reduce inmate complaints and frustration over unfair and arbitrary classification decisions. We informed the CDA that we felt the promotion of inmates' understanding of the system was desirable so that inmates would be aware that their conduct affected their point totals, which in turn affected their security and custody designations. In this way, the system would serve as a potential impetus for positive inmate behavior and would reduce management problems.

The CDA concurred with our position and issued a special order to all branch facilities directing that inmates be allowed access to all sections of the classification manual, with the exception of the section on inmate transfers.

We informed the complainant of the corrective action by the CDA.

(86-2776) Security classification not scored correctly. An inmate at a correctional facility complained that his security classification was improperly increased due to the expiration of misdemeanor sentences that he was serving concurrently with a longer felony sentence.

We learned that the inmate was serving a ten-year sentence for a felony conviction concurrently with two one-year sentences for misdemeanor convictions. After the inmate's misdemeanor sentences expired, these sentences were counted against the inmate as "prior commitments" to a correctional facility. This action was the only reason for increasing the inmate's security classification.

We reviewed the Corrections Division (CD) policy and procedure on inmate classification and found no specific provision addressing the situation. We brought the matter to the attention of the facility administrator and in turn he requested clarification from the CD administration. The CD administrator (CDA) indicated that "prior commitments" referred to an inmate's record of commitments prior to the inmate's current commitment. As such, the expiration of a sentence that was served concurrently with other sentences as part of the inmate's current commitment should not be considered a prior commitment for security classification purposes.

Subsequently, supervisors at the facility were informed of the CDA's determination and were instructed to take necessary corrective action for inmates improperly classified in the past. As the complainant was released on parole before the resolution of his complaint, we wrote to inform him of the corrective action taken.

(86-3254) Policy for dispensing analgesics and cough syrup. An inmate complained that a new medical unit (MU) policy restricted the dispensing of aspirin and cough syrup to once every 12 hours. He claimed that in the past inmates were allowed to obtain such medication from the MU every three to four hours.

Upon our inquiry, a MU nurse informed us that the restriction was instituted because some inmates were taking too much nonprescription medication and there was concern that excessive intake of nonprescription medication might mask a more serious illness requiring the attention of a physician. The nurse also informed us that, if necessary, adult corrections officers (ACOs) in the housing units could dispense nonprescription medication to the inmates at their discretion. She reported, however, that most ACOs were concerned about liability and thus were reluctant to dispense the nonprescription medication. She agreed that written policies and procedures covering the proper dispensing of nonprescription medication should be developed and transmitted to the housing unit staff.

After consultation with facility doctors, the MU informed all housing unit staff by memorandum that cough syrup would no longer be administered in the housing units and that inmates would have to obtain cough syrup from the MU and should be examined by a physician, if there is a medical problem. The practice of ACOs administering nonprescription pain medication to inmates was also suspended pending the resolution of the concerns raised by the ACOs.

Thereafter, a written policy and procedure governing the dispensing of nonprescription pain medication was developed. The policy and procedure required that each housing unit maintain a supply of the medication for self-administration by inmates under staff supervision and maintain a log of administrations. It also limited dosage, frequency of doses, and duration of administration.

We notified the complainant of the new policy and procedure.

(86-3396) Improper delays in issuing payment to providers of medical services to medical assistance program patients. A dentist complained about delays by the Medical Care Administration (MCA), DSSH, in processing payment of several claims his office submitted for services he provided to medical assistance recipients. Some of the unpaid claims were submitted to the MCA one-and-a-half years ago. The complainant was informed that the claims were transmitted to the MCA dental consultant for authorization of payment. As the MCA dental consultant did not authorize payment, the claims were not paid.

We reviewed Chapter 750, HAR, entitled "Authorization, Payment, and Claims in the Medical Assistance Program." Section 17-750-3, HAR, stated in part:

> Controlling factors for payment. (a) The department shall pay for the cost of medical care when the department's medical consultants determine medical care to be necessary to the eligible patient's

well-being and medical care is provided, under standards generally acceptable to the medical community, by a practitioner approved by the department to participate in medicaid.

Section 17-750-4, HAR, stated in part:

(g) A request for a DSSH consultant's authorization shall be acted upon within thirty days and a copy of the decision, together with reasons for the decision, if the request is denied, shall be sent to both the provider and the recipient.

We discussed the complaint with the MCA administrator and transmitted copies of the complainant's unpaid claims to the MCA. The administrator agreed to discuss the complaint with the dental consultant.

Subsequently, the complainant informed us that the MCA dental consultant contacted his office and was provided with information. The MCA then informed us that the dental consultant reviewed and authorized payment for all of the complainant's claims. The MCA also informed us that there was a backlog of unpaid claims for dental services because the procedures required the authorization of the dental consultant before claims were processed for payment. In order to expedite payment to dental service providers, the MCA changed the procedure to instead require a post payment review.

We informed the complainant of the change in the MCA procedures and confirmed the complainant's receipt of payment for all of his claims.

(86-3482) Processing of inmate grievances. An inmate complained that a step 2 grievance to the branch administrator that he filed was returned to him without a response because he had not attached the response to his step 1 grievance.

The Administrative Rules of the Corrections Division provided three successively higher levels of review of inmate grievances. An inmate could pursue a grievance to the next higher level if the inmate was dissatisifed with the response received at the lower level.

We contacted the unit manager (UM) who returned the step 2 grievance to the inmate without a response. We pointed out that Corrections Division (CD) Policy and Procedure 493.12.03 (CD Policy), entitled "Inmate Grievance and Appeals Process/ Administrative Remedy Process," stated that when a step 2 grievance is filed, the section administrator or the UM shall forward to the branch administrator copies of the inmate's step 1 grievance and the decision on that grievance. Similarly, when an inmate submits a step 3 grievance, the branch administrator shall forward to the CD administrator (CDA) copies of the step 1 and step 2 grievances and responses.

The UM stated that she did not believe the CD Policy imposed upon staff the responsibility to make the copies of the lower level grievance responses. However, she indicated that for this case she would forward a copy of the inmate's step 2 grievance for response.

We brought the matter to the attention of an administrator of the facility. We cited a letter we received in a previous case from the CDA regarding the CD Policy, which stated in part:

> Let it be noted here that the existing procedures for appealing a complaint/grievance has been amended and simplified. The amended version essentially eliminates the requirement of the inmate to submit any accompanying documents on appeals to higher levels. All that would be required of the inmate is a written statement regarding the basis of such appeals.

The administrator requested a copy of the CDA's letter, which we provided. We informed the administrator that we believed the CDA's letter clearly indicated that inmates were not responsible for the submittal of copies of lower level grievances and responses when filing a grievance at a higher level. We asked that the administrator inform us of the action to be taken to ensure that the facility staff complied with the CD Policy.

The administrator responded that the facility would revise its policies and procedures to conform with the CD Policy. Subsequently, the facility procedure was revised to make staff responsible for forwarding copies of the lower level grievances and responses when the inmate files a grievance at the next higher level.

We advised the complainant of the corrective action taken by the facility.

86-3629) Improper strip searching of a visitor. An inmate at a correctional facility complained that staff members required his wife to submit to a strip search prior to every visit with him during the previous nine or ten months. The inmate understood this requirement was imposed initially because his wife was suspected of bringing contraband into the facility during visits. However, since no evidence of his wife bringing contraband into the facility was found, he felt that continuation of the strip searches was unreasonable.

We learned that previously, by memorandum, the facility administrator limited the number of consecutive visits during which a visitor could be strip searched without the facility administrator's review and approval. In the memorandum, the administrator noted that continuous strip searching of a visitor over a prolonged period may be unreasonable.

According to information from the complainant, it appeared that the number of visits during which his wife was strip searched exceeded the limit established by the facility administrator without the administrator's approval. We informed the facility's chief of security of the complaint and inquired as to the basis

for the continued strip searches of the complainant's wife. After reviewing the case, the chief of security informed us that there appeared to be no probable cause for continuing the strip searches and strip searches of the complainant's wife would cease immediately.

We also learned that the chief of security was on sick leave when the facility administrator issued the memorandum on strip searches and was not aware of the procedural requirements established by the administrator. After reviewing the memorandum, however, the chief of security informed appropriate security personnel of the procedural requirements therein.

The complainant was subsequently notified of the corrective action in this case.

(86-3968) Improper withholding of State tax refund. A father complained that the DSSH withheld a portion of his 1985 State tax refund because he was allegedly delinquent in child support payments. The complainant contended that he was current on his child support payments and thus the withholding was improper.

We noted that Chapter 231, HRS, entitled "Administration of Taxes," authorized the State to withhold State income tax refunds of persons delinquent in child support payments. Sections 231-51 and 231-53, HRS, stated:

> Purpose. The purpose of sections 231-52 to 231-59 is to permit the retention of state income tax refunds of those persons owing a debt to the State or who are delinquent in the payment of child support.
>
> Setoff against refund. The State, through the department of accounting and general services, upon request of a claimant agency, shall set off any valid debt due and owing a claimant agency by the debtor against any debtor's refund. Any amount of the refund in excess of the amount retained to satisfy the debt shall be refunded to the debtor.

(Emphasis added).

Section 231-52, HRS, defined "claimant agency," "debt," and "refund" as follows:

> "Claimant agency" means the department of social services and housing or an agency under cooperative agreement with the department, whenever the department is required by law to enforce a support order on behalf of an individual.
>
> "Debt" includes:
>
> (1) Any delinquency in periodic court-ordered payments for child support in an amount exceeding the sum of payments which would become due over a one-month period;
>
> . . . .

"Refund" includes any state income tax refund which is or will be due any debtor, or any other sums due to a debtor from the State.

We informed the Child Support Enforcement Agency (CSEA), DSSH, of the complainant's contention that he was current in his support payments. After a review of the complainant's account, the CSEA informed us that the complainant was current in payments and that the complainant's 1985 State tax refund was withheld because of its delay in posting information of payments made to his account. The posting delay also resulted in the improper withholding of a portion of the complainant's Federal income tax refund.

Subsequently, we confirmed the complainant received an apology letter from the CSEA and checks for the portions of his 1985 State and Federal tax refunds that were erroneously withheld.

(86-4118) Guilty finding by an adjustment committee. An inmate complained about an adjustment committee's decision finding him guilty of fighting with his roommate. He admitted that words were exchanged between himself and his roommate, but claimed his roommate initiated the physical altercation. Further, he claimed that he did not return any of the blows directed at him by his roommate at any time during the incident. He also reported sustaining injuries which required medical attention.

The incident reports submitted by several adult corrections officers indicated that the complainant may have verbally provoked the incident but did not fight back and only attempted to defend himself from the blows directed at him by his roommate. Even the roommate's version of the incident supported the complainant's claim that he did not fight back. Thus, it did not appear that the complainant actively participated in the physical altercation.

We therefore requested that the facility administrator reconsider the adjustment committee's decision. Subsequently, the facility administrator informed us that appropriate steps to exonerate the complainant would be taken.

We later learned that all materials related to the charge and disposition were expunged from the inmate's file. We notified the complainant of the corrective action taken.

(86-4209) Lack of action following injury to foster child. We received a complaint about a lack of action by the Public Welfare Division (PWD) following an incident in which a foster child fell into a barrel of boiling slop on the farm of the child's foster parents. The slop was being prepared to feed pigs on the farm.

Through our discussions with the PWD staff and a review of the PWD case records, we learned that the incident occurred nearly two years ago. On the day of the incident, a PWD worker had contacted the foster home by telephone to make a routine check. While the

foster parent was talking with the worker, the child fell into the barrel of boiling slop. The foster parent excitedly told the worker what occurred and terminated the telephone conversation. The foster parents then called for police and emergency medical assistance.

The child was taken to the hospital and a PWD worker reported to the hospital to check on the child and to talk with the foster parents. The foster parents explained that the child, who was playing near the boiling slop container, accidentally fell in and was pulled out by another teenage foster child. The teenager corroborated the foster parent's story and added that the child fell into the slop barrel when he moved towards a tomato that was next to the barrel.

The PWD concluded that the child's injury was accidental. To prevent a similar accident in the future, the foster parents constructed a new area for slop preparation which the PWD considered to be safe. During the two years since the accident, no further accidents occurred and the foster parents adopted the child.

We concluded that the actions taken by the PWD were reasonable. We were concerned, however, that the accident and follow-up action of the PWD were not completely documented in the case record. The PWD acknowledged the lack of complete documentation and an administrator subsequently issued a directive to all supervisors requiring that injuries to foster children be documented in the child's case record and in the foster home record. The directive stated that the documentation should indicate whether the injuries were the result of an accident and include as much information as possible about the circumstances of the injuries.

We informed the complainant of our findings and the action taken by the PWD.

(87-250) Failure to notify inmate of an increase in his security/custody classification. An inmate at a correctional facility complained that he did not receive written notice that his security/custody classification was increased five months earlier. He reported that he learned of the action recently and therefore was only recently able to appeal the action through the inmate grievance process.

In our investigation, facility staff informed us that to expedite the decision-making process in the interest of maintaining the security of the facility, the normal program committee process was not utilized to increase the inmate's security/custody classification. Facility staff confirmed that written notice of the decision was not issued to the inmate and informed us that written notice to inmates of classification decisions is not required when a program committee does not participate in the decision-making process. The staff felt, therefore, that the matter was handled properly.

We reviewed Subchapter 1 of the Administrative Rules of the Corrections Division, entitled "The Classification Process," which stated in relevant part:

Sec. 17-201-1 General provisions. An inmate's or ward's classification determines where the inmate or ward is best situated within the corrections division. . . . Classification is intended to be in the best interest of the individual, the state, and the community. In short, classification is a continuing evaluation of each individual to ensure that the inmate or ward is given the optimum placement within the corrections division.

Sec. 17-201-2 Program committee. (a) Where a program committee is deemed desirable, it shall be composed of at least three members. A small facility may designate one person to act in the capacity as the program committee.

(b) When deemed desirable, the facility administrator may convene a program committee to assist with its recommendations. All classification decisions, including interstate transfers or increases in classification, may be accomplished without convening a program committee.

. . . .

(d) Because of the advisory nature of the program committee, the committee's review process, where deemed desirable, may be informal and non-adversarial. Considerations regarding notice, the appearance of the inmate or ward before the program committee, opportunity to be heard, presentation of evidence or testimony, availability of counsel substitute, or confrontation and cross-examination are entirely within the discretion of the program committee.

(e) The inmate or ward shall be apprised of the findings of the program committee:

. . . .

(2) The inmate or ward shall be given a brief written summary of the committee's findings within a reasonable time after the review, which findings shall briefly set forth the reasons for the action taken.

(3) The facility administrator may review the program committee's recommendation and:

(A) Affirm or reverse, in whole or part, the recommendation.

(B) Hold in abeyance any action the administrator believes jeopardizes the safety, security, or welfare of the staff.

(C) Make any decision regarding an inmate's or ward's placement or classification deemed appropriate.

Sec. 17-201-3 Review. Each inmate or ward has the right to seek administrative review of the decision through the grievance process.

(Emphases added).

Based on the foregoing provisions, we concluded that the facility could increase an inmate's security/custody classification without convening a program committee. Further, although rules required that inmates be provided written notice of a program committee's findings, the rules did not require written notice to inmates of classification decisions made without a program committee's participation. Nonetheless, in view of the impact classification decisions have upon inmates, we believed inmates should be provided written notice of such decisions even in those instances where the decision is made without a program committee's participation.

We brought the matter to the attention of the facility administrator. He agreed with our position and informed staff that inmates should be provided written notice of classification decisions that are made without a program committee's participation. We informed the complainant of the facility administrator's action.

(87-468) Delay in payment of child support pass-through. A woman receiving assistance under the Federal Aid to Families with Dependent Children (AFDC) program complained that she did not receive the "pass-through" portion of child support payments made by her ex-husband. Under Federal regulations, $50 of each monthly child support payment (or less if the payment is less than $50 per month) made in a timely manner "passes through" to the custodial parent receiving public assistance under the AFDC program. The custodial parent thus receives the pass-through amount in addition to the monthly public assistance under the AFDC program.

The complainant reported that her ex-husband made several timely support payments of $30 a month, but she did not receive the pass-through payments for these months. The complainant's AFDC worker was apparently unable to resolve her concerns.

We contacted the Child Support Fiscal Office (CSFO), which received her ex-husband's payments and was responsible for forwarding the pass-through payments. The CSFO informed us that in the past delays occurred when the complainant's ex-husband did not make timely payments to the courts or when the courts did not forward the payments to the CSFO in a timely manner. The CSFO anticipated a reduction in delays because as of July 1, 1986, payments were to be made directly to the CSFO rather than to the courts.

Upon review of the case, the CSFO reported that a number of pass-through payments, which the CSFO had not processed in a timely manner, were owed to the complainant. The CSFO also informed us that the pass-through amounts due would be paid to the complainant by three separate payments. The CSFO estimated the time schedule by which the payments would be made, and we informed

the complainant of the estimated schedule. Subsequently, we verified with the complainant her receipt of the first payment and advised her to contact our office should she encounter problems with subsequent payments.

Several months later, the complainant again contacted our office and reported that she had not received pass-through payments for three subsequent months. When we contacted the CSFO, we were informed that the CSFO was working on clearing a backlog in processing pass-through payments to AFDC recipients. The CSFO then advised the complainant and our office of a schedule for payment of the delinquent pass-through amounts.

(87-664) Failure of a correctional facility to issue a handbook to an inmate. An inmate at a correctional facility complained that he was not provided an Inmate Handbook, which contained Title 17, Administrative Rules of the Corrections Division (CD Rules), with which all inmates were expected to comply. The complainant contended that any disciplinary action taken by staff for his violations of the CD Rules would be unfair because he was not informed of these rules. The complainant explained that when he requested an Inmate Handbook, he was told copies were available for review by inmates in certain areas of the facility or could be borrowed upon request.

We noted that section 17-200-1(b) of the CD Rules stated:

> One copy of the corrections division and individual facility rules shall be given in handbook form to each inmate or ward and all staff personnel. Receipt of the rules shall be noted in each inmate's, ward's and employee's file. The rules shall also be posted at each facility.

(Emphasis added).

When we brought the complaint to the attention of the facility administrator, he confirmed that inmates were provided access to the Inmate Handbook in certain areas of the facility or could borrow a copy for a limited time upon request. He also assured us that inmates were informed of these alternatives for access to an Inmate Handbook.

The facility administrator also explained that the practice of issuing Inmate Handbooks to inmates was discontinued because inmates frequently lost or damaged the handbooks they received. He also informed us that the issuance of handbooks to inmates presented special problems at the facility due to the high turnover rate of its predominately short-term inmate population.

Although the facility administrator acknowledged that not issuing Inmate Handbooks to inmates violated the CD Rules, he chose to continue the practice since he felt there was a reasonable basis for it.

We disagreed with the position of the facility administrator and requested that the CD administrator (CDA) review the situation. The CDA thereafter determined that the facility's practice violated the CD Rules and ordered corrective action.

Subsequently, the complainant informed us that he and the other inmates at the facility were provided Inmate Handbooks.

(87-1375) Delay in repairing defects of new home. A homeowner complained about a delay by the Hawaii Housing Authority (HHA) in repairing defects in his newly purchased house, which was located in a HHA housing project and built through the cooperative efforts of the HHA and a community college. Students at the community college participated in the construction of the house as part of a course at the college.

Upon our inquiry, a HHA official informed us of the HHA's plans to have a new crew of students commence repairs in a few months when the crew would be in the area to construct another home. Nonetheless, the official acknowledged that the delay was unwarranted and arranged to expedite the repairs. The complainant confirmed that the repairs were completed within the following month.

(87-2078) Insufficient recreation in administrative segregation. An inmate in administrative segregation complained that he was allowed only 30 to 45 minutes of recreation outside his cell on an irregular basis. Before contacting our office, the inmate filed a grievance on the matter and in response, the facility informed him that according to the policies and procedures of the Corrections Division (CD), inmates in administrative segregation shall be provided a minimum of 45 minutes of recreation time each day, five days per week, either indoors or outdoors.

In our investigation, we confirmed that the CD policies and procedures required that inmates be provided with a minimum of 45 minutes of exercise per day, five days per week, either indoors or outdoors. However, we also noted that Section 17-204-8 of the Administrative Rules of the CD stated:

> Scheduling. Scheduling of inmate and ward recreation shall be developed by each facility, keeping in mind that the inmate and ward shall have the opportunity to engage in a minimum of one hour of recreation per weekday, either indoors or outdoors.

(Emphasis added).

As the CD rule required that all inmates have an opportunity to engage in a minimum of one hour of recreation per weekday, without regard to an inmate's placement in disciplinary or administrative segregation, we informed the CD administrator of the conflict between the CD rule and the CD policies and procedures. The provision in the CD policies and procedures was thereafter amended to require, in accordance with the CD rule, that inmates in disciplinary or administrative segregation be provided a minimum of one hour of exercise per day, five days per week, either indoors or outdoors.

We informed the inmate of the amendment. In the meantime, however, the facility had entered into an agreement with the inmate to provide him two hours per day of out-of-cell recreation.

(87-2437) Pre-confinement credits not computed properly. An inmate at a correctional facility complained that he was not credited for the more than four months of his incarceration in another state while awaiting extradition to Hawaii. The complainant informed us that he was arrested in Nevada as a fugitive from Hawaii. Thereafter, he was convicted and sentenced for criminal offenses committed in Nevada. After serving part of his sentence in Nevada, he was extradited to Hawaii and convicted and sentenced for criminal offenses committed in Hawaii.

The complainant contended that because he was arrested in Nevada on Hawaii charges, the time he served in Nevada while awaiting extradition to Hawaii should be credited toward his Hawaii sentence. The complainant explained that he tried to resolve the matter through the staff at the correctional facility, but Nevada officials did not respond to inquiries from Hawaii.

We noted that section 706-671, HRS, entitled "Credit for time of detention to sentence; credit for imprisonment under earlier sentence for same crime," stated in part:

> (1) When a defendant who is sentenced to imprisonment has previously been detained in any State or local correctional or other institution following his arrest for the crime for which sentence is imposed, such period of detention following his arrest shall be deducted from the minimum and maximum terms of such sentence. . . .

We inquired with the correctional facility about its computation of the complainant's pre-sentence credit. We also consulted with the Department of the Prosecuting Attorney and the Honolulu Police Department (HPD). We learned that there was no documentation to verify the pre-sentence credit the complainant was entitled to, or that he was arrested in Nevada on outstanding Hawaii charges.

Therefore, we sought documentation from records available in Hawaii to determine the date from which the complainant was held in Nevada pending extradition to Hawaii. We learned that while the complainant was detained in Nevada on Nevada charges, the HPD requested by letter that Nevada detain the complainant pending extradition to Hawaii. The HPD request was made approximately three months prior to the date from which the complainant's pre-sentence credit was computed.

The correctional facility reviewed the HPD letter and determined that the complainant should receive pre-sentence credit from the date of the HPD request. Appropriate action was taken to correct the complainant's record of pre-sentence credit, and the complainant's maximum and minimum sentences were amended.

(87-2661) Improper housing placement for inmate with medical needs. An inmate complained about his transfer from the facility's medical housing area to a general housing area. He claimed his medical needs were not being met in his current housing area and that his medical condition required his placement in the medical housing area.

The inmate reported he had only one kidney and was suffering from chronic urinary problems which began before his incarceration. The facility's medical unit (MU) recently transferred him to a general housing area and provided him equipment and supplies with which to treat his medical problems himself. According to the inmate, however, his medical condition was deteriorating despite his efforts to treat himself.

Upon our inquiry, security staff in the inmate's current housing area confirmed that the inmate's physical condition appeared to have deteriorated and that the inmate was not able to properly treat himself. Further, they expressed concern that the medical equipment and supplies the inmate required to treat himself created security problems.

We immediately informed the administrator of the section that supervised the MU of the complaint and the information we received from the security staff. We expressed our concern about the inmate's current housing assignment and requested a reevaluation of the inmate's housing needs. The next day the inmate was examined by a facility physican and thereafter transferred to the facility's medical housing area. We contacted the inmate subsequently and confirmed his transfer.

(87-2779) Improperly detained in a correctional facility. An inmate complained he was not released from prison the previous day, as he expected. According to the inmate, he was represented by a deputy public defender in district court for contempt and theft charges, sentenced to five days of imprisonment for the convictions, and given pre-sentence credit for the five days he spent in confinement while awaiting trial. He contended that he should have been released from the correctional facility on the day of his sentencing.

The sentencing documents, however, did not clearly indicate that the complainant should be released on the day of sentencing. In addition, existing law required that the time a defendant is imprisoned following arrest, for a crime for which a sentence of imprisonment is imposed, shall be credited toward the sentence imposed. Since the complainant was arrested for the contempt charges and confined for five days thereafter, the facility did not credit the five days toward his sentence for the theft conviction. The correctional facility concluded that the complainant should begin serving his five-day sentence for theft from the date of his sentencing.

We informed the Office of the Public Defender (PD), B&F, of the complaint. The PD reported that the complainant was arrested for a contempt of court charge for failing to appear in court for theft charges, confined for five days, convicted of the contempt and theft charges, sentenced to five days of imprisonment, and

given pre-sentence credit of five days for both charges. It was the PD's position, therefore, that the complainant should have been released on the day of his sentencing.

The PD interceded on behalf of the complainant and he was immediately released upon the correctional facility's receipt of amended documents which clearly expressed the court's intention.

(87-3153) Acquired Immune Deficiency Syndrome (AIDS) management in State correctional facilities. Inmates of various State correctional facilities expressed concern about the absence of testing for AIDS and the lack of provisions for the management of inmates diagnosed as having AIDS.

In our investigation, we learned that only one State correctional facility had written policies regarding the testing for and management of AIDS victims. Inasmuch as it appeared that AIDS was a concern at all State correctional facilities, we asked the administrator of the Corrections Division (CD) to consider developing a division policy and procedure on the subject applicable to all State correctional facilities.

The CD thereafter developed a policy and procedure applicable to State correctional facilities for the testing and management of AIDS. The policy and procedure was distributed to correctional administrators for implementation.

(87-3224) Delay in processing inmate identification (ID) badge. An inmate complained that he had not participated in outside recreation for two months because of a delay in his receiving an ID badge.

In our investigation, we learned that after his conviction and sentencing, but prior to his classification, the inmate was transferred from the pre-trial felon housing area to a sentenced felon residency unit. This transfer occurred two months prior to the complaint. We also learned that pre-trial felons are not required to have ID badges and can participate in outside recreation in an area of the correctional facility separate from sentenced felons. Sentenced felons, however, are required to wear ID badges whenever they are on authorized movement outside their residency units, including going to outside recreation.

We also learned that ID badges are not processed and issued until an Individual Evaluation Summary (IES) has been prepared and the sentenced felon has been classified. After an inmate is sentenced, an IES is prepared. The IES, a comprehensive, narrative description of an inmate, is used to establish tentative parole dates and correctional programming. Staff are allowed three months to complete the IES. Thereafter, the inmate is classified in accordance with his security and custody needs. Security needs relate to physical (architectural, environmental) constraints appropriate for a particular inmate, and custody needs relate to the level of staff supervision required. Classification recommendations are thereafter submitted by staff for review and approval by the program control administrator.

Upon our inquiry, staff acknowledged that they have sufficient information to assess an inmate's security and custody needs without the IES. Thus, the completion of an IES before classification and before the issuance of ID badges appeared unnecessary. The program control administrator agreed and directed the staff thereafter to classify an inmate after sentencing even though an IES may not be completed.

We also learned that the issuance of an ID badge was delayed in this case because the ID officer was on leave. The staff member, who was authorized, in the absence of the ID officer, to activate the inmate ID workline which processed ID badges, informed us that he would only activate the workline when he had time from his regularly assigned duties. He informed us further, however, that he would only authorize the workline to process ID badges for staff.

As inmates are not permitted to participate in programs and activities without the ID badges, we requested that the correctional facility administrator review the matter. He thereafter notified us that he directed a designated staff member to process both inmate and staff ID badges in the absence of the ID officer. He also issued a directive establishing a seven-workday deadline for classifying inmates whose status changed from pre-trial felon to sentenced felon. In addition, he instructed staff that sentenced felons should not be transferred to sentenced felon residency units until they are classified and issued ID badges.

During our investigation, the complainant received his ID badge and was allowed outside recreation.

(87-4018) Administered medication by mistake. An inmate in a correctional facility complained that tuberculosis medication was unnecessarily administered to him the previous evening. He claimed he did not have tuberculosis and as there was another inmate in the facility with the same name, the medication may have been intended for the other inmate. He reported that his name appeared on written orders from the medical unit (MU) regarding inmates' medication.

We immediately contacted the facility's MU and informed them of the complaint. The MU staff informed us that the complainant did not require tuberculosis medication and that the medication was mistakenly administered to the complainant because there was another inmate in the facility with the same name. Orders were immediately amended thereafter, and the complainant confirmed that the medication was no longer administered to him.

DEPARTMENT OF TRANSPORTATION

(86-3940) Improvements made to highway causing damage to adjacent private property. A property owner complained that during heavy rains, recent improvements to the State highway fronting his property caused silt to build up in his cattle guard and water to drain onto his property. The complainant informed us that the siltation reduced the effectiveness of his cattle guard and created a risk of his cattle escaping or being injured. In addition, the complainant observed that highway grading work that was done along his property line was eroding onto his property, which raised the level of the ground along his fenceline and created added risk of his cattle running away. The complainant contacted the Highways Division, DOT, and although the DOT completed some corrective work, the complainant felt that the problem remained unresolved.

We contacted the DOT district engineer, who agreed to have his staff personally contact the complainant to identify the current problems and to arrange for appropriate corrective measures. We were also informed that the problems described by the complainant might take some time to rectify if special equipment was required for the work.

Subsequently, we confirmed that the DOT sent a representative to identify the current problems and discuss corrective measures with the complainant. Thereafter, the work was performed as necessary equipment became available and the complainant confirmed that appropriate corrective action was taken and his complaint was resolved.

(87-301) Construction of a carport for use by employees. We received a complaint that Harbors Division (HD) employees constructed a carport at a HD baseyard with State materials so that covered parking would be available to certain HD employees during the workday.

The maintenance section supervisor confirmed that a five-vehicle carport comprised of metal posts and a corrugated iron roof was constructed. He informed us that HD engineers prepared the construction drawings and HD staff built the carport with surplus State materials. He further informed us that although the construction plans for the carport were not submitted for review and approval by HD administration, the construction would now be reviewed because his office submitted a proposal to the HD fiscal office to charge employees a monthly fee for covered parking.

We inquired with the HD administration as to the proper procedure for obtaining approval to use State materials and employees for the construction of an employee parking structure. We also asked for confirmation as to whether employees would be required to pay a fee for the covered parking.

The HD administration responded that verbal approval should have been sought and obtained from the district manager. The supervisor who authorized the work was not aware of this

requirement and was cautioned that issuance of such authorization was beyond his authority. The HD administration also confirmed that the employees using the carport were being charged the standard rate for covered parking.

We recommended that written, rather than oral, approval for the construction of small projects be required. The HD administration readily agreed and issued a memorandum instructing all maintenance section supervisors that a DOT requisition form with an outline or sketch of improvement projects must be submitted. The request would be reviewed and approved in writing by the appropriate branch chief and submitted to the district manager for review and final approval.

(87-4251) Delay in installation of traffic signal light at intersection. A woman sought the assistance of our office in expediting the installation of a traffic signal light at the intersection of Puiwa Road and Pali Highway. She described the difficulty and hazard encountered by downtown-bound motorists when crossing the three lanes of Windward-bound traffic on the Pali Highway during the afternoon rush hour after picking up their children at a preschool located at the corner of Dowsett Avenue and Pali Highway. Since Puiwa Road was situated one block makai of Dowsett Avenue, a traffic signal light at the intersection of Puiwa Road and Pali Highway would create a break in traffic traveling on Pali Highway, thereby enabling motorists from Dowsett Avenue to safely cross the Windward-bound lanes of Pali Highway.

Before contacting our office, the caller had spoken with a Highways Division traffic engineer, whom she described as very cordial and helpful. He explained that there was insufficient traffic at the Dowsett Avenue-Pali Highway intersection to warrant a traffic signal light at the intersection. A traffic signal light at the Puiwa Road-Pali Highway intersection, however, was already planned but the traffic engineer estimated it would take three years to install.

When we contacted the traffic engineer, he explained that the installation of a traffic signal light at the Puiwa Road-Pali Highway intersection was included in a project to widen Pali Highway. The traffic engineer indicated that the project would be put out to bid later in the year and estimated completion a year after the contract was awarded. Thus, the installation of a traffic signal light at the Puiwa Road-Pali Highway intersection would be completed in a year-and-a-half. The traffic engineer admitted that the time estimate of three years provided to the woman was too conservative.

When we inquired about the feasibility of immediately installing the traffic signal light at the Puiwa Road-Pali Highway intersection rather than as part of the widening project, the traffic engineer informed us that if a traffic signal light were installed prior to the widening project, it would have to be removed and reinstalled during the widening project. As the estimated cost of a typical signal light ranged from $150,000 to $175,000, the installation of a traffic signal light at the intersection prior to the widening project was not considered worthwhile.

Subsequently, we drove through the area and identified a route from Dowsett Avenue through several "back streets" to an intersection at Waokanaka Street and Pali Highway. A traffic signal light was situated at that intersection to assist motorists in crossing Pali Highway. By using the route we identified, a motorist would have to travel a total of 1.7 miles more than would be required to cross the three lanes of Pali Highway traffic at the Dowsett Avenue-Pali Highway intersection.

We informed the caller of the additional information we received from the traffic engineer and of the route to the Waokanaka Street-Pali Highway intersection. The woman was not aware that the intersection was accessible by a route from the preschool. Since her primary concern was safety, she said she would use the route.

CITY AND COUNTY OF HONOLULU

(87-652) Real property tax payments. A woman complained of being improperly billed for real property taxes she previously paid. She informed us that she overpaid her property taxes in 1985 and the overpayments should have been applied to property taxes due in August 1986 and February 1987. She contended that as her 1985 overpayments were sufficient to pay the property taxes due in August 1986 and February 1987, the billing issued to her for these taxes was improper.

The complainant reported that she owned three pieces of real property for which she paid the Real Property Tax Collection and Accounting Section (Real Property Tax Office), Department of Finance, C&C, $437.24 for property taxes: $433.74 in August 1985 and $3.50 in October 1985 when she visited the Real Property Tax Office. It was her understanding that these two payments constituted full payment for all real property taxes she owed for the next year-and-a-half.

In our investigation, we found that real property taxes are assessed for each fiscal year, which begins July 1 and ends on June 30 of the following calendar year. Property owners may pay the taxes assessed in two equal installments on or before August 20 and February 20 of each fiscal year.

The Real Property Tax Office informed us that for fiscal year 1985-1986, the complainant owed real property taxes on only two properties (two condominium units). The tax assessment on the two properties was $430.24 and $7.00, respectively. Although the complainant acquired a third property in fiscal year 1985-1986, no real property taxes were due on that unit until fiscal year 1986-1987 because the previous owner had paid all the real property taxes due for fiscal year 1985-1986.

The Real Property Tax Office confirmed that the complainant paid $433.74 in August 1985. That payment was applied to satisfy the total $430.24 tax assessment on one property and half of the

$7.00 tax assessment on the second property ($3.50). When the complainant visited the Real Property Tax Office in October 1985, she was informed of how her $433.74 payment had been distributed. She was also informed that upon her request, part of that payment could be refunded to her because only one-half of her property taxes were due at that time. The other half of her property taxes were not due until February 20, 1986. Instead, the complainant paid an additional $3.50 and thus satisfied the real property tax assessments on both her properties for fiscal year 1985-1986. The Real Property Tax Office reportedly tried to resolve the complainant's current concerns with the information above but apparently had been unable to do so.

We reviewed copies of the complainant's cancelled checks, her real property tax bills, and the real property tax ledger which confirmed the accuracy of the information we received from the Real Property Tax Office. It appeared the complainant had only paid her real property taxes for fiscal year 1985-1986. The complainant's early payment of part of her 1985-1986 real property taxes may have caused her some confusion, but since the real property tax billing she complained about was for property taxes for fiscal year 1986-1987, which she had not paid, the billing for real property taxes due on August 1986 and February 1987 was proper.

We informed the complainant of our findings.

COUNTY OF HAWAII

(86-3043) Return of unclaimed money to finder. A woman complained that the police department failed to return the money in a wallet she found and turned over to the police department nine months earlier. The complainant claimed that the money should have been returned to her, as the finder, because it was not claimed even after the police department made several attempts by mail to contact the four individuals whose identifications were found in the wallet.

The police department informed us that two certified letters were sent to each of the four individuals identified in the wallet. Three of the individuals had out-of-State addresses, and one had a local address. The certified letters requested that the individual contact the police department regarding the lost property, but no one responded to the letters or claimed the money. The police department informed us that in such situations, section 52-11, HRS, required that the money be turned over to the Department of Finance.

We reviewed section 52-11, HRS, which stated:

> Reports on and disposition of lost or found, stolen, or unclaimed property. Each chief of police of the several counties on the first Monday in January and the first Monday in July in each year shall deliver an account, verified by

oath, to the treasurer or director of finance of his county, of all moneys (except money found), goods, wares, and merchandise then remaining unclaimed, and which have remained unclaimed for a period of not less than ninety days, in his custody, and at least once annually, after making such report, shall give notice once a week, for four successive weeks, by publication, in the English language, in one newspaper of general circulation, published and circulated in the county, and also post in a conspicuous place, at the post office and at the courthouse of the district where the sale shall take place, copies of the printed notice to all persons interested or claiming the property, that unless claimed by the owner, with satisfactory proof of ownership, before a specified day, the goods, wares, and merchandise will be sold at public auction to the highest bidder. On the day, and at the place specified in the notice, all property remaining unclaimed, except money and found property, shall be sold by auction by or under the direction of the chief of police. If any goods, wares, or merchandise of a perishable nature or which are unreasonably expensive to keep or safeguard, at any time remain unclaimed in the custody of the officer, the officer may sell the same at public auction, at such time and after such notice as to him seems proper and reasonable under the circumstances. The officer shall immediately after the sale of any property in accordance herewith, pay to the treasurer or director of finance of the county all moneys remaining unclaimed in his hands as such officer, and all moneys received by him upon the sale.

We also reviewed section 52-15, HRS, which stated:

Duty and right of finders. All money or property found shall be reported or delivered by the finder to the chief of police of the county, and, when so delivered, shall be held by the chief of police for forty-five days or until claimed by some person who establishes title or right of custody thereto to the satisfaction of the chief of police. In the event of such establishment of title or right of custody, the money or property shall be delivered to the claimant by the chief of police. If no claim is made or no such right is established within the forty-five days, the money or property shall be returned to the person who delivered it to the chief of police; provided that if the person who delivered it to the chief of police fails to claim the money or property within thirty days after being notified by the chief of police that he is entitled to possession, the chief of police shall dispose of the money or property in accordance with the procedures established in section 52-11. For the purpose of this part, notice by registered or

certified mail to the last known address of the person who delivered the money or property to the chief of police, shall be deemed sufficient.

(Emphasis added).

Inasmuch as section 52-15, HRS, appeared to require the return of unclaimed property to the finder, we brought the section to the attention of the police department. The police department sought the advice of the Department of the Corporation Counsel and thereafter the Corporation Counsel advised the police department that the complainant was entitled to receive the money she found pursuant to section 52-15, HRS.

Subsequently, we confirmed with the complainant that the money she found was returned to her.

APPENDIX

CUMULATIVE INDEX OF SELECTED CASE SUMMARIES

The following cumulative index lists all selected case summaries which appeared in our annual Report Nos. 1 through 18. The case summaries are arranged by case number sequence under the appropriate agency or level of government. Each case summary refers the reader to the appropriate report number and page.

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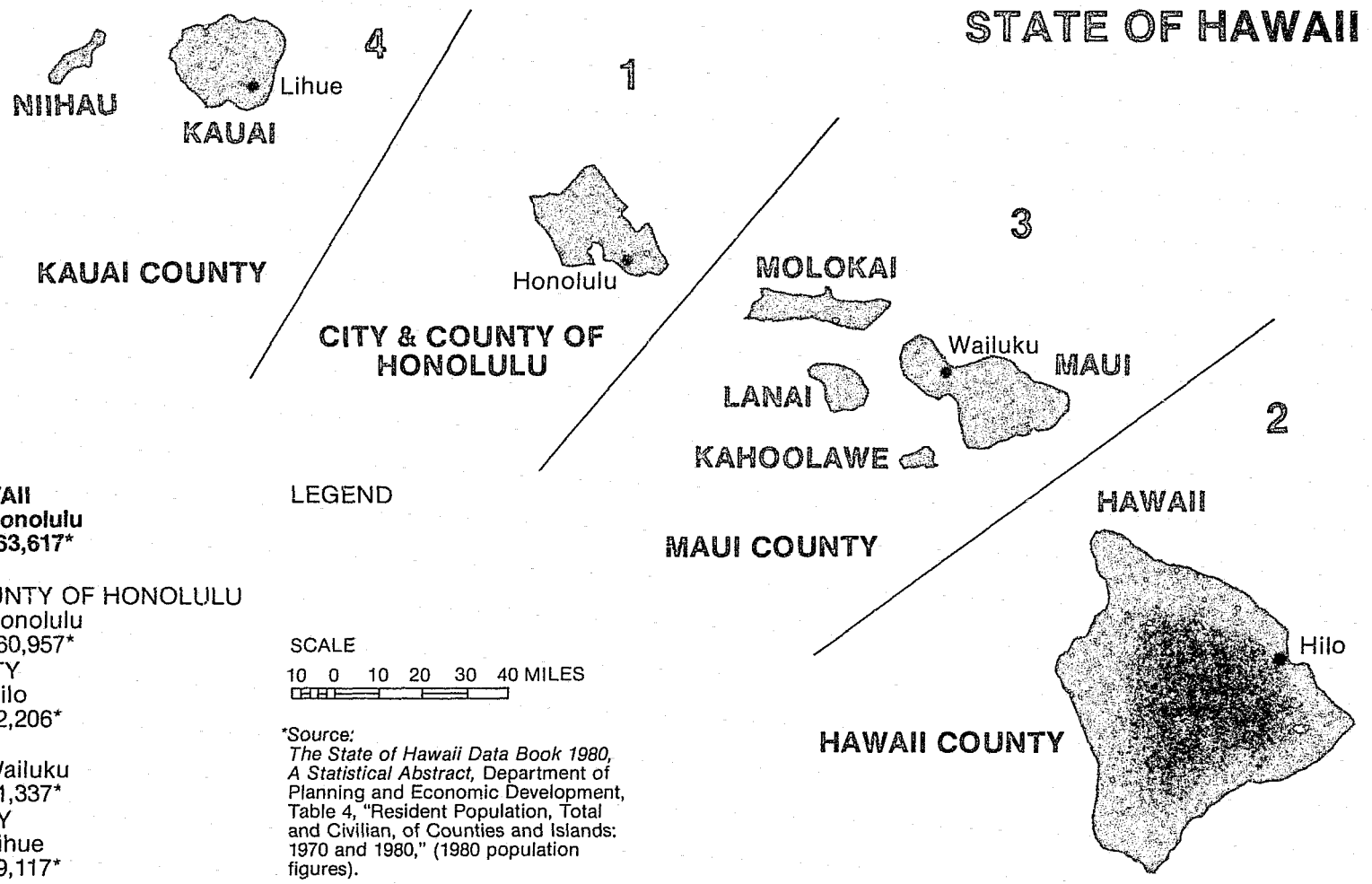

STATE OF HAWAII
Capital: Honolulu
Population: 963,617*

1. CITY AND COUNTY OF HONOLULU
   County Seat: Honolulu
   Population: 760,957*
2. HAWAII COUNTY
   County Seat: Hilo
   Population: 92,206*
3. MAUI COUNTY
   County Seat: Wailuku
   Population: 71,337*
4. KAUAI COUNTY
   County Seat: Lihue
   Population: 39,117*

LEGEND

SCALE

10 0 10 20 30 40 MILES

*Source:
The State of Hawaii Data Book 1980, A Statistical Abstract, Department of Planning and Economic Development, Table 4, "Resident Population, Total and Civilian, of Counties and Islands: 1970 and 1980," (1980 population figures).