Office of the Ombudsman
State of Hawaii
Fiscal Year 2008-2009
Report Number 40

Office of the Ombudsman 2008-2009

Report No. 40

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As a service to the public provided by the legislature, the Office of the Ombudsman receives and investigates complaints from the public about injustice or maladministration by executive agencies of the State and county governments.

The Ombudsman is a nonpartisan officer of the legislature. The Ombudsman is empowered to obtain necessary information for investigations, to recommend corrective action to agencies, and to criticize agency actions; but the Ombudsman may not compel or reverse administrative decisions.

The Ombudsman is charged with: (1) accepting and investigating complaints made by the public about any action or inaction by any officer or employee of an executive agency of the State and county governments; and (2) improving administrative processes and procedures by recommending appropriate solutions for valid individual complaints and by suggesting appropriate amendments to rules, regulations, or statutes.

By law, the Ombudsman cannot investigate actions of the governor, the lieutenant governor and their personal staffs; the legislature, its committees and its staff; the judiciary and its staff; the mayors and councils of the various counties; an entity of the federal government; a multistate governmental entity; and public employee grievances, if a collective bargaining agreement provides an exclusive method for resolving such grievances.

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Neighbor island residents may call our toll-free numbers.

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Maui	**984-2400**
Kauai	**274-3141**
Molokai, Lanai	**1-800-468-4644**

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State of Hawaii

Report of the Ombudsman

For the Period July 1, 2008 - June 30, 2009
Report No. 40

Presented to the Legislature
pursuant to Section 96-16 of
the Hawaii Revised Statutes

December 2009

Mme. President, Mr. Speaker, and Members of the
Hawaii State Legislature of 2010:

In accordance with Section 96-16, Hawaii Revised Statutes, I am pleased to submit the report of the Office of the Ombudsman for fiscal year 2008-2009. This is the fortieth annual report since the establishment of the office in 1969.

On behalf of all the members of the office and the citizens who utilize our services, I would like to thank the State Legislature for its continued support. I would also like to express my appreciation to the Governor, the Mayors of the various counties, and the State and County department heads and employees for their ongoing cooperation and assistance in our efforts to resolve citizen complaints and to assure fair treatment for the people of Hawaii.

Those who sought assistance from our office would not have been as ably served in a timely, objective, efficient, and professional manner without the exemplary services of First Assistant David Tomatani and the other staff members of the office. For their continued commitment and dedication to the mission and purpose of our office, I convey my personal thanks.

Respectfully submitted,

ROBIN K. MATSUNAGA
Ombudsman

December 2009

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Chapter I

THE YEAR IN BRIEF

Total Inquiries Received

During fiscal year 2008-2009, the office received a total of 4,560 inquiries. Of these inquiries, 3,171, or 69.5 percent, may be classified as complaints within the jurisdiction of the office. The remaining inquiries consisted of 537 non-jurisdictional complaints and 852 requests for information.

The 4,560 inquiries received represent a 1.9 percent decrease from the 4,649 inquiries received the previous fiscal year. There was a slight increase in non-jurisdictional complaints. We received the same number of information requests as last year.

A comparison of inquiries received in fiscal year 2007-2008 and fiscal year 2008-2009 is presented in the following table.

TWO-YEAR COMPARISON

Years	Total Inquiries	Information Requests	Non-Jurisdictional Complaints	Jurisdictional Complaints		
				Total Jurisdictional	Prison Complaints	General Complaints
2008-2009	4,560	852	537	3,171	1,640	1,531
2007-2008	4,649	852	529	3,268	1,746	1,522
Numerical Change	-89	0	8	-97	-106	9
Percentage Change	-1.9%	0.0%	1.5%	-3.0%	-6.1%	0.6%

Staff Notes

Ombudsman Robin Matsunaga participated in a brown-bag luncheon forum of ombudsmen and served as a panelist (representing state-level classical ombudsman offices) at the annual meeting of the Association for Conflict Resolution in Austin, Texas, from September 24 to 27, 2008. Following this annual meeting, Mr. Matsunaga attended the United States Ombudsman Association (USOA) Conference in Lexington, Kentucky, from September 29 to October 3, 2008, where he served as an instructor of the USOA's two-day New Ombudsman Training workshop. The conference was also attended by Analysts Yvonne Faria, Gansin Li, and Dawn Matsuoka. After the conference ended and before returning home, Mr. Matsunaga, Mr. Li, and Ms. Matsuoka conducted a site visit of the Otter Creek Correctional Center in Wheelwright, Kentucky, where female inmates from Hawaii were being held.

As described in a prior report, the Office of the Ombudsman provides the Election Advisory Council (EAC) with a representative who serves as an observer during each State election. The EAC is an advisory group to the Chief Election Officer and its members are the "eyes and ears" for the general public to ensure that our elections are conducted honestly and efficiently. Staff member Debbie Goya represented the Office of the Ombudsman as an official observer in the 2008 primary and general elections, and attended training and test ballot sessions on several Saturdays in preparation for this important responsibility.

Analyst Paul Kanoho resigned from our office on December 15, 2008, to accept a position as Deputy Prosecuting Attorney with the County of Kauai. We send Paul our best wishes as he embarks on his new career.

Rene Dela Cruz joined our office as an analyst on February 17, 2009. Rene's varied background includes a BS degree in Biology from the University of Washington, a Master of Public Health degree from the University of Hawaii, and a Doctor of Jurisprudence from the University of Wisconsin. Most recently he was an Executive Assistant to the County of Hawaii Mayor and Managing Director, where he served as community liaison as well as planned, organized, and executed assigned tasks with various County departments, agencies, and private consultants.

At the end of the year, our office staff consisted of Ombudsman Robin Matsunaga; First Assistant David Tomatani; analysts Herbert Almeida, Mark Au, Rene Dela Cruz, Yvonne Faria, Alfred Itamura, Gansin Li, Dawn Matsuoka, and Lynn Oshiro; and support staff Sheila Alderman, Edna de la Cruz, Debbie Goya, Sue Oshima, and Linda Teruya.

Outreach Efforts

Ombudsman Robin Matsunaga attended and spoke at three neighborhood board meetings in July 2008. On July 9, he provided information about the Office of the Ombudsman to the Palolo Neighborhood Board; on the evening of Thursday, July 10, he spoke about our office to the Diamond Head/Kapahulu/St. Louis Heights Neighborhood Board; and on the evening of July 16, he explained the role of our office to the Kaimuki Neighborhood Board.

Beginning August 1, 2008, Ombudsman Matsunaga and Long-Term Care Ombudsman John McDermott participated in a series of neighbor island forums in conjunction with the Center for Alternative Dispute Resolution, Hawaii State Judiciary. These forums were held in Lihue, Kauai; Waimea and Hilo on the island of Hawaii; Wailuku, Maui; and Kaunakakai, Molokai. The purpose of the forums was to provide information about the services and programs offered by the Ombudsman offices, discuss the role of the Ombudsman in dispute resolution, address confidentiality issues, and identify emerging trends. Messrs. Matsunaga and McDermott were also open to meeting with mediators to talk about ways their respective offices can work with community mediation centers. A similar forum was held in the Kapolei State Building on Oahu on November 24, 2008.

The Ombudsman staff participated in the 24th Annual Seniors' Fair held at the Neal S. Blaisdell Center from September 19 to 21, 2008, and the Annual Seniors' Fair hosted by the Aiea and Pearl City area legislators at the Pearlridge Shopping Center on October 4, 2008. The fair at the Blaisdell Center attracted over 20,000 attendees, and both events enabled us once again to share information about our office with members of the community involved in or interested in the many issues facing our senior citizens today.

Ombudsman Matsunaga made presentations to the Hawaii Civil Rights Commission and to the Board of the Hawaii Public Housing Authority (HPHA) on January 14 and 15, 2009, respectively. These were excellent opportunities to explain our work to both agencies and to understand their concerns and answer any questions they had regarding our office. In addition, it had been suggested that the HPHA establish an internal ombudsman to receive and investigate complaints, so the HPHA Board was interested in learning more about how our office operates.

Ombudsman Matsunaga was invited to address the Pearl City Lions Club on the evening of January 14, 2009. After explaining the role and function of the office, Mr. Matsunaga answered questions and engaged in discussions with attending members.

Chapter II

STATISTICAL TABLES

For all tables, the percentages may not add up to
a total of 100% due to rounding.

TABLE 1
NUMBERS AND TYPES OF INQUIRIES
Fiscal Year 2008-2009

Month	Total Inquiries	Jurisdictional Complaints	Non-Jurisdictional Complaints	Information Requests
July	411	309	53	49
August	350	255	27	68
September	429	302	55	72
October	408	279	55	74
November	299	235	30	34
December	359	249	51	59
January	348	222	53	73
February	381	256	37	88
March	373	242	40	91
April	421	283	41	97
May	375	256	44	75
June	406	283	51	72
TOTAL	4,560	3,171	537	852
% of Total Inquiries	--	69.5%	11.8%	18.7%

TABLE 2
MEANS BY WHICH INQUIRIES ARE RECEIVED
Fiscal Year 2008-2009

Month	Telephone	Mail	E-mail	Fax	Visit	Own Motion
July	360	23	13	2	12	1
August	319	19	8	0	3	1
September	380	28	14	2	4	1
October	362	32	6	2	5	1
November	258	27	10	0	4	0
December	322	24	6	0	7	0
January	320	16	12	0	0	0
February	352	15	9	1	4	0
March	336	23	4	0	5	5
April	381	26	8	2	3	1
May	325	32	9	1	8	0
June	356	30	10	0	7	3
TOTAL	4,071	295	109	10	62	13
% of Total Inquiries (4,560)	89.3%	6.5%	2.4%	0.2%	1.4%	0.3%

TABLE 3
DISTRIBUTION OF POPULATION AND INQUIRERS BY RESIDENCE
Fiscal Year 2008-2009

Residence	Population*	Percent of Total Population	Total Inquiries	Percent of Total Inquiries
City & County of Honolulu	905,034	70.3%	3,124	68.5%
County of Hawaii	175,784	13.6%	557	12.2%
County of Maui	63,689	4.9%	430	9.4%
County of Kauai	143,691	11.2%	146	3.2%
Out-of-State	--	--	303	6.6%
TOTAL	1,288,198	--	4,560	--

*Source: The State of Hawaii Data Book 2008, A Statistical Abstract. Hawaii State Department of Business, Economic Development, and Tourism, Table 1.06, "*Resident Population, by County: 1990 to 2008.*"

TABLE 4
DISTRIBUTION OF TYPES OF INQUIRIES
BY RESIDENCE OF INQUIRERS
Fiscal Year 2008-2009

	TYPES OF INQUIRIES					
	Jurisdictional Complaints		Non-Jurisdictional Complaints		Information Requests	
Residence	Number	Percent of Total	Number	Percent of Total	Number	Percent of Total
C&C of Honolulu	2,164	68.2%	338	62.9%	622	73.0%
County of Hawaii	391	12.3%	69	12.8%	97	11.4%
County of Maui	322	10.2%	37	6.9%	71	8.3%
County of Kauai	95	3.0%	21	3.9%	30	3.5%
Out-of-State	199	6.3%	72	13.4%	32	3.8%
TOTAL	3,171	--	537	--	852	--

TABLE 5
MEANS OF RECEIPT OF INQUIRIES
BY RESIDENCE
Fiscal Year 2008-2009

Residence	Total Inquiries	Means of Receipt					
		Telephone	Mail	E-mail	Fax	Visit	Own Motion
C&C of Honolulu	3,124	2,875	92	78	7	59	13
% of C&C of Honolulu	--	92.0%	2.9%	2.5%	0.2%	1.9%	0.4%
County of Hawaii	557	523	19	14	1	0	0
% of County of Hawaii	--	93.9%	3.4%	2.5%	0.2%	0.0%	0.0%
County of Maui	430	404	17	8	1	0	0
% of County of Maui	--	94.0%	4.0%	1.9%	0.2%	0.0%	0.0%
County of Kauai	146	137	8	1	0	0	0
% of County of Kauai	--	93.8%	5.5%	0.7%	0.0%	0.0%	0.0%
Out-of-State	303	132	159	8	1	3	0
% of Out-of-State	--	43.6%	52.5%	2.6%	0.3%	1.0%	0.0%
TOTAL	4,560	4,071	295	109	10	62	13
% of TOTAL	--	89.3%	6.5%	2.4%	0.2%	1.4%	0.3%

TABLE 6
DISTRIBUTION AND DISPOSITION OF JURISDICTIONAL COMPLAINTS BY AGENCY
Fiscal Year 2008-2009

Agency	Juris-dictional Complaints	Percent of Total	Completed Investigations		Discon-tinued	Declined	Assisted	Pending
			Substan-tiated	Not Substan-tiated				
State Departments Accounting & General Services	28	0.9%	3	13	1	4	3	4
Agriculture	6	0.2%	0	3	0	1	1	1
Attorney General	133	4.2%	8	23	9	11	78	4
Budget & Finance	74	2.3%	7	33	8	13	8	5
Business, Economic Devel. & Tourism	12	0.4%	0	7	3	0	0	2
Commerce & Consumer Affairs	54	1.7%	4	24	9	13	1	3
Defense	5	0.2%	0	5	0	0	0	0
Education	94	3.0%	3	37	10	28	4	12
Hawaiian Home Lands	7	0.2%	4	1	0	1	0	1
Health	97	3.1%	22	32	10	27	4	2
Human Resources Development	8	0.3%	2	0	2	2	1	1
Human Services	415	13.1%	87	165	39	82	20	22
Labor & Industrial Relations	131	4.1%	11	60	16	32	7	5
Land & Natural Resources	64	2.0%	9	23	5	13	5	9
Office of Hawaiian Affairs	2	0.1%	0	0	0	1	0	1
Public Safety	1,720	54.2%	178	676	69	674	56	67
Taxation	30	0.9%	3	10	7	3	6	1
Transportation	54	1.7%	5	17	7	14	5	6
University of Hawaii	18	0.6%	3	2	3	9	0	1
Other Executive Agencies	6	0.2%	1	2	1	2	0	0
Counties City & County of Honolulu	158	5.0%	14	56	12	54	11	11
County of Hawaii	26	0.8%	2	8	2	9	1	4
County of Maui	20	0.6%	1	7	3	6	0	3
County of Kauai	9	0.3%	0	2	1	6	0	0
TOTAL	3,171	--	367	1,206	217	1,005	211	165
% of Total Jurisdictional Complaints	--	--	11.6%	38.0%	6.8%	31.7%	6.7%	5.2%

TABLE 7
DISTRIBUTION AND DISPOSITION OF SUBSTANTIATED JURISDICTIONAL COMPLAINTS BY AGENCY
Fiscal Year 2008-2009

Agency	Substantiated Complaints	Complaints Rectified	Not Rectified/ No Action Necessary
State Departments Accounting & General Services	3	3	0
Agriculture	0	0	0
Attorney General	8	8	0
Budget & Finance	7	7	0
Business, Economic Devel. & Tourism	0	0	0
Commerce & Consumer Affairs	4	4	0
Defense	0	0	0
Education	3	3	0
Hawaiian Home Lands	4	4	0
Health	22	21	1
Human Resources Development	2	2	0
Human Services	87	86	1
Labor & Industrial Relations	11	11	0
Land & Natural Resources	9	9	0
Office of Hawaiian Affairs	0	0	0
Public Safety	178	174	4
Taxation	3	3	0
Transportation	5	5	0
University of Hawaii	3	3	0
Other Executive Agencies	1	1	0
Counties City & County of Honolulu	14	11	3
County of Hawaii	2	2	0
County of Maui	1	1	0
County of Kauai	0	0	0
TOTAL	367	358	9
% of Total Substantiated Jurisdictional Complaints	--	97.5%	2.5%
% of Total Completed Investigations (1,573)	23.3%	22.8%	0.6%

TABLE 8
DISTRIBUTION OF INFORMATION REQUESTS
Fiscal Year 2008-2009

Agency	Information Requests	Percent of Total
State Departments Accounting & General Services	18	2.1%
Agriculture	4	0.5%
Attorney General	31	3.6%
Budget & Finance	30	3.5%
Business, Economic Devel. & Tourism	6	0.7%
Commerce & Consumer Affairs	119	14.0%
Defense	4	0.5%
Education	14	1.6%
Hawaiian Home Lands	1	0.1%
Health	66	7.7%
Human Resources Development	1	0.1%
Human Services	34	4.0%
Labor & Industrial Relations	24	2.8%
Land & Natural Resources	19	2.2%
Office of Hawaiian Affairs	1	0.1%
Public Safety	31	3.6%
Taxation	7	0.8%
Transportation	8	0.9%
University of Hawaii	5	0.6%
Other Executive Agencies	22	2.6%
Counties City & County of Honolulu	86	10.1%
County of Hawaii	8	0.9%
County of Maui	9	1.1%
County of Kauai	2	0.2%
Miscellaneous	302	35.4%
TOTAL	852	--

TABLE 9
DISTRIBUTION OF NON-JURISDICTIONAL COMPLAINTS
Fiscal Year 2008-2009

Jurisdictional Exclusions	Number of Complaints	Percent of Total
Collective Bargaining	21	3.9%
County Councils	1	0.2%
Federal Government	45	8.4%
Governor	7	1.3%
Judiciary	86	16.0%
Legislature	12	2.2%
Lieutenant Governor	0	0.0%
Mayors	0	0.0%
Multi-State Governmental Entity	0	0.0%
Private Transactions	361	67.2%
Miscellaneous	4	0.7%
TOTAL	537	--

TABLE 10
INQUIRIES CARRIED OVER TO FISCAL YEAR 2008-2009 AND THEIR DISPOSITIONS, AND INQUIRIES CARRIED OVER TO FISCAL YEAR 2009-2010

Types of Inquiries	Inquiries Carried Over to FY 08-09	Inquiries Carried Over to FY 08-09 and Closed During FY 08-09	Balance of Inquiries Carried Over to FY 08-09	Inquiries Received in FY 08-09 and Pending	Total Inquiries Carried Over to FY 09-10
Non-Jurisdictional Complaints	3	3	0	4	4
Information Requests	0	0	0	2	2
Jurisdictional Complaints	158	153	5	165	170
		Disposition of Closed Complaints: Substantiated 35 Not Substan. 106 Discontinued 12 153			
TOTAL	161	156	5	171	176

Chapter III

SELECTED CASE SUMMARIES

The following are summaries of selected cases investigated by the office. Each case summary is listed under the State government department or the county government involved in the complaint or inquiry. Although some cases involved more than one department or involved both the State and the county, each summary is placed under what we believe to be the most appropriate agency.

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DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

(07-03728) Personal use of State vehicles. In the course of investigating a complaint concerning an employee's personal use of a State vehicle, we reviewed the Department of Accounting and General Services (DAGS) procedure regarding such use. Based on our review, we were of the opinion that the procedure did not comply with State law, which required the written recommendation of the DAGS comptroller and the written permission of the governor to allow a State employee the personal use of a State vehicle.

We requested that the comptroller review the matter. We noted that the personal use of a State vehicle by an employee is generally prohibited by Chapter 105, Hawaii Revised Statutes (HRS), titled "Government Motor Vehicles." Section 105-1, HRS, states:

> Except as provided in section 105-2, <u>it shall be unlawful for any person to use, operate, or drive any motor vehicle owned or controlled by the State, or by any county thereof, for personal pleasure or personal use (as distinguished from official or governmental service or use)</u> including, without limitation to the generality of the foregoing, travel by or conveyance of any officer or employee of the State, or of any county thereof, directly or indirectly, from his place of service or from his work to or near his place of abode, or, directly or indirectly, from such place of abode to his place of service or to his work. (Emphasis added.)

Certain exceptions to the above restriction are listed in Section 105-2, HRS, including the following:

> Section 105-1 shall not apply to:
>
> . . . .
>
> (4) Any officer or employee of the State who, <u>upon written recommendation of the comptroller, is given written permission by the governor</u> to use, operate, or drive for personal use (but not for pleasure) any motor vehicle owned or controlled by the State; . . . (Emphasis added.)

We noted that a comptroller's memorandum to all State department heads, dated March 15, 2006, reminded State officials and employees to submit requests for permits authorizing the personal use of government vehicles for the period from July 1, 2006 to June 30, 2008. Enclosed with the

memorandum was a form titled "Application for Personal Use of State-Owned Vehicle." The application required recommendations by heads of the employee's division and department, and approval by the comptroller. The application did not mandate the approval of the governor, as required by law.

We also noted that in our investigation of a previous complaint, DAGS staff informed us that it relied on Administrative Directive No. 7, dated October 7, 1963, which was issued by then Governor John A. Burns. Section VII (2) of the directive states in part: "The authority and responsibility to approve departmental policies on personal use of government vehicles is hereby delegated to the Director of the Department of Accounting and General Services."

We believed that Governor Burns' directive did not delegate the authority to approve individual employee applications for the personal use of State vehicles to the DAGS director (now called the comptroller), and instead only authorized the director to approve other departments' policies on the personal use of government vehicles.

Based on the foregoing, we informed the comptroller that it did not appear that the procedure by which an employee obtained permission for the personal use of a State vehicle complied with the requirements of Chapter 105, HRS, because permission was being granted by the comptroller and not by the governor.

We asked the comptroller to inform us whether he agreed that the procedure was not in compliance with the law and if he agreed, that he inform us of the corrective action to be taken. If he disagreed, however, we asked for an explanation as to how the procedure was in compliance with the statutory requirement.

Subsequently, the comptroller informed us that he agreed that the procedure may not be in statutory compliance and that he planned to seek the delegation of authority by the governor to the comptroller to approve applications for the personal use of State vehicles. Thereafter, the comptroller informed us that the governor issued Administrative Directive No. 08-02, dated October 30, 2008, which stated in part:

> The purpose of this directive is to allow the State Comptroller of the Department of Accounting and General Services to administer section 4 of §105-2, Exceptions, Hawaii Revised Statutes.
>
> . . . .
>
> The authority and responsibility to approve departmental policies and designated employees personal use of

> government vehicles is delegated to the State Comptroller of the Department of Accounting and General Services or designee. In addition, the State Comptroller shall develop procedures for the application and approval for personal use of government vehicles. (Emphasis added.)

Since the governor has the authority to delegate duties to subordinates, we believed that the governor's directive brought the procedure into compliance with the law.

DEPARTMENT OF THE ATTORNEY GENERAL

(08-03645) Bar owners made responsible for enforcement of smoking ban. A man who claimed that he represented an association of bar owners complained that the Department of the Attorney General (AG) was issuing letters to bar owners that wrongfully made the bar owners responsible for enforcing the provisions of Chapter 328J, Hawaii Revised Statutes (HRS), titled "Smoking."

The complainant provided us with a copy of the AG's letter, which was a form letter that notified the establishment owner, manager, or operator that the establishment was in violation of Chapter 328J, HRS, which prohibited smoking in enclosed or partially enclosed places that were open to the public. The letter identified two violations in the law: (1) the absence of "Smoking Prohibited by Law" signs; and/or (2) a failure to prohibit smoking in the establishment. The letter stated further that the person in charge of the establishment must stop people from smoking or must get them to exit more than twenty feet from an entrance if they continue to smoke. The letter noted that noncompliance with the provisions of Chapter 328J, HRS, is a violation that may result in increasingly severe fines and that further violations could result in the loss of the establishment's food permit or liquor license, or both. A copy of Chapter 328J, HRS, was attached to the letter.

The complainant contended that the law does not require bar owners to enforce the law by stopping people from smoking or getting smokers to exit more than twenty feet from an entrance if they continued to smoke. The complainant contended that "threatening" bar owners with sanctions was unreasonable.

We reviewed Chapter 328J, HRS, and found that it prohibited smoking in all enclosed or partially enclosed areas open to the public, including bars. The law also prohibited smoking within a minimum distance of twenty feet from entrances, exits, windows that open, and ventilation intakes that serve an area where smoking is prohibited; required the owner,

operator, manager, or person in control of the place where smoking is prohibited to post signs in and at the entrance of such place that notify persons that smoking is prohibited; and prohibited any person or employer from discharging, refusing to hire, or retaliating against an employee, applicant for employment, or customer because that employee, applicant, or customer exercises any rights afforded by the law or reports or attempts to prosecute a violation of the law.

Significantly, Chapter 328J, HRS, stated that the enforcement of compliance with the chapter shall be under the jurisdiction of the Department of Health (DOH). The law required an owner, manager, operator, or employee of an establishment regulated by the chapter to inform persons violating this chapter of its provisions.

After reviewing Chapter 328J, HRS, we were in agreement with the complainant that the AG form letter placed undue responsibility on bar owners to enforce the law. We contacted the DOH and found that it was in the process of adopting administrative rules required by the law. In the interim, the DOH asked the AG for assistance in enforcing the law and the issuance of the letter in question was part of the enforcement effort by the AG.

We contacted the deputy attorney general who developed the AG form letter. We advised him of the complaint and that we were in agreement with the complainant that the letter misstated the enforcement responsibilities of establishment owners, managers, or operators under Chapter 328J, HRS. The deputy attorney general informed us that the form letter was being revised, but he did not know whether the original form letter was still being used in the interim and he agreed to look into the matter. Subsequently, the deputy attorney general informed us that the use of the original form letter had ceased and a revised letter that comported with the law was finalized.

At our request, the deputy attorney general provided us a copy of the revised letter, which informed establishment owners, managers, or operators that it is a violation of the law if the signage requirements of Chapter 328J, HRS, were unmet; if the establishment failed to inform violators of the provisions of the chapter; or if there was retaliation against an employee, applicant, or customer because the employee, applicant, or customer exercised any rights afforded by the chapter or reported or attempted to prosecute a violation of the chapter. The revised form letter did not require the establishment owners, managers, or operators to stop people from smoking or to get them to exit more than twenty feet from an entrance if they continued to smoke.

We informed the complainant of the corrective action taken and he agreed that the revised letter comported with the law.

DEPARTMENT OF HEALTH

(09-01640) Required to resubmit medical records and consent to release of protected information. A man complained that in order to appeal the denial of mental health services, the Adult Mental Health Division (AMHD) consumer affairs office required him to again submit medical records and his consent to release of medical records even though he had previously submitted the requested documents to an AMHD adult mental health center. He questioned why the medical records and consent form he submitted previously did not suffice.

The complainant had applied for services at an AMHD adult mental health center. A social worker interviewed him and his authorized representative. The complainant signed a consent form to authorize his doctor to release medical records and provide information to the social worker as necessary for the determination of his eligibility for services. The social worker subsequently denied the complainant's application for services because his needs were being met by his authorized representative, to whom he had given power of attorney. The complainant then sent a written appeal to the AMHD consumer affairs office.

We contacted the consumer affairs office and were informed that the complainant was required to submit a signed consent form authorizing the release of his medical records because the consent form previously provided by the complainant to the adult mental health center was for the purpose of determining his eligibility for services. Since the complainant's medical records would now be reviewed to make a determination on his appeal, the consumer affairs office required that he submit another consent form. The consumer affairs office felt that information used by the adult mental health center to determine eligibility for services could not be shared with the AMHD medical director, who would make the determination on the complainant's appeal.

We reviewed the AMHD Policy and Procedure Manual (Manual) regarding the appeals process and confirmed that the AMHD medical director shall review the denial of services and shall make a determination to overturn or ratify the denial. However, the Manual did not state that information obtained by AMHD adult mental health centers could not be shared with the AMHD medical director, nor that another signed consent form was required. We questioned whether the position of the consumer affairs office was correct, as adult mental health center staff and the medical director are all AMHD employees and the complainant had consented to the release of his medical records to the AMHD for the purpose of determining his eligibility for services.

We contacted the AMHD medical director's office. We learned that when an appeal is filed, an applicant's medical records that were considered in denying an application are forwarded to the medical director for review. Contrary to what we were informed by the consumer affairs office, the medical director is permitted to review the same information obtained by the adult mental health center. At our request, the medical director's office informed the consumer affairs office that medical records that were already provided to the adult mental health center can be shared with the medical director, so an appellant need not resubmit such records and another consent form when filing an appeal.

We thereafter informed the complainant that he did not need to resubmit his medical records and consent form to the consumer affairs office for his appeal.

DEPARTMENT OF HUMAN SERVICES

(08-04215) Garnishment of paycheck to satisfy an old medical bill. A woman complained to us in May 2008 that her pay was being garnisheed to satisfy a bill for radiology services that her then newborn daughter received in a hospital from November 1995 through February 1996. Her daughter was eligible for medical coverage during this period through the Med-QUEST Division (Med-QUEST), but her radiology bills were not paid.

According to the complainant, a claim for payment was submitted by the radiology company (Company) to Med-QUEST but the claim was rejected. The Company also sent a bill to the complainant but because she moved residences she did not receive the bill. The Company then referred the unpaid bill to a collection agency. The complainant was briefly employed in 2000 and her pay was garnisheed to satisfy the bill, but she terminated employment after only a portion of the bill was paid. She contacted our office in May 2008 because her pay was being garnisheed again and she was unsuccessful in having Med-QUEST pay the bill.

The complainant provided us with copies of the radiology bills and her pay statements showing amounts that were garnisheed. The complainant also furnished us a copy of a court judgment against her, dated March 16, 1999 in the amount of $1,783 and an Affidavit of Judgment Creditor(s) for Garnishment of Wages, filed in court on April 22, 2008, which stated that in consideration of accumulated interest and payments credited, the total amount owed was $2,194.

We contacted Med-QUEST staff and confirmed that the radiology services received by the complainant's daughter should have been covered

by Medicaid, a Med-QUEST program. However, because more than a dozen years had passed, Med-QUEST no longer had any records of the claim and was unable to determine the reason the claim was denied. The staff also informed us that according to the Medicaid contract, the Company should not have billed the complainant. Instead, after the claim was denied, the Company had one year to resubmit the claim to Med-QUEST for payment, but the one-year deadline had long since passed.

Since the Company should not have billed the complainant nor attempted to collect payment from her, we informed Med-QUEST staff that the garnishment of the complainant's pay should cease. We provided Med-QUEST with copies of the records we received from the complainant. The Med-QUEST staff agreed that the complainant's pay should not be garnisheed, contacted the Company, and the garnishment was stopped.

A Med-QUEST branch administrator inquired further about the bill with the Company. The Company researched its records and reported that the complainant did not inform the hospital that her daughter was covered by Medicaid when she gave birth and that was part of the reason the bill was not paid. Despite the court judgment against the complainant, the Company agreed to refund $929 to her. Although it appeared that the complainant may have paid slightly more than that amount, the administrator felt that the complainant bore some of the responsibility for the problem by not informing the hospital that she had Medicaid coverage and by not contacting Med-QUEST sooner.

The complainant was grateful for the refund that she received. She believed that without the involvement of our office, she would not have received anything.

(09-00143) Erroneous beginning date for child care assistance. A number of parents who received monthly child care payments complained about delays in their receipt of the payments.

Under the Federal Child Care and Development Block Grant Amendments of 1996, every State is entitled to receive payments to be used for child care assistance to parents who are trying to achieve independence from public assistance. Each State is allowed flexibility to develop child care programs and policies that best suit the needs of children and parents within the State. In Hawaii, the Department of Human Services (DHS) has broad authority to administer and implement the program through government or contracted private sector agencies, but in either case the DHS retains overall responsibility for the program.

In the course of our investigations, we learned that the delays in child care payments were due in large part to a transition in the processing of the

payments from the DHS to a contracted private agency. We also learned that the private agency was using the date of interview of applicants, rather than the date of application, as the date from which parents could begin to receive child care payments in all cases.

We reviewed Title 17, Chapter 798.2, Hawaii Administrative Rules, titled "Child Care Services." According to the rules, if an application interview has been completed and other eligibility requirements have been met, the date of eligibility for child care services shall be the date that the signed and dated application is received by the DHS.

In using the date of interview instead of the date of application, the private agency was not in compliance with the rules and eligible applicants were not being paid for child care assistance retroactive to the date of application. Thus, the initial payment to these applicants was less than the amount they were entitled to receive.

We brought the matter to the attention of the contracted private agency, but the private agency maintained that it was in compliance with the rules. We thereafter contacted the DHS employee who was monitoring the contract between the State and the private agency. The contract monitor agreed with our understanding of the rules and wrote to the private agency. However, the number of complaints to our office against the private agency continued to increase, so we brought the matter to the attention of the DHS child care program administrator as we believed there was a systemic problem. The administrator was not aware that the private agency was misapplying the rules and agreed to follow up with the private agency.

We monitored the case until the DHS acted to correct the misapplication of the rules. The DHS also took over the processing of new applications for child care assistance until such time that the private agency could retroactively remedy its errors in the past cases.

(09-01103) Delay in processing of medical assistance application. A woman with a power of attorney filed an application with the Med-QUEST Division (Med-QUEST) for Medicaid benefits on behalf of her elderly father, who resided in a skilled nursing facility. Three months after filing the application, the woman complained to our office about a delay in processing the application. She said that Med-QUEST staff only told her that the application was pending, but she thought there was a forty-five or sixty-day deadline to process the application.

We contacted the Med-QUEST eligibility branch administrator. After looking into the matter, the administrator informed us that there was a delay

in the assignment of the application to a caseworker. After the application was assigned, the worker asked for additional information from the complainant. Based on the information the complainant provided, her father's application was denied due to excessive income. The worker sent the complainant a denial letter ninety-seven days after the date of the application.

We reviewed Title 17, Chapter 1711, Hawaii Administrative Rules (HAR), titled "Application Processing Requirements." Section 17-1711-13, HAR, stated in part:

> Requirements for disposition of application. . . .
>
> . . . .
>
> (e) Timely dispositions of eligibility or ineligibility shall be made within:
>
> (1) Sixty days from the date of application for applicants who apply for medical assistance on the basis of disability; or
>
> (2) Forty-five days from the date of application for all other applicants.
>
> . . . .
>
> (i) A delay beyond the time standard which is attributable to the department shall not result in the withholding of medical assistance from the applicant. A presumption of medical eligibility shall be made effective on the forty-sixth day or on the sixty-first day until a determination is rendered.

Since the complainant's father did not apply for Medicaid on the basis of a disability, the deadline for processing his application was forty-five days from the date of his application. As the delay in processing his application was attributable to the department, we believed that the rule required a presumption of eligibility and that the complainant's father was therefore eligible for medical assistance from the forty-sixth day following the date of his application until the disposition of his application on the ninety-seventh day.

We brought the matter to the attention of the eligibility branch administrator, who confirmed our interpretation of the rule. The administrator informed us that Med-QUEST would cover any medical bills for eligible services that the complainant's father received from the forty-sixth day until

the ninety-seventh day following the date of his application, provided that the services were provided by approved Medicaid providers and that the providers billed Medicaid for their services.

We reported our findings to the complainant.

(09-01236) Required to pay co-payment for prescription due to delay in Medicaid enrollment. A woman who had been receiving secondary health care coverage through the Med-QUEST Division (Med-QUEST) was determined on September 1, 2008 to be disabled and thus became eligible for medical assistance under the Medicaid program, which was also administered by Med-QUEST.

The woman complained on October 6, 2008 that when she went to pick up her medication, the pharmacy informed her that she was required to pay the co-payment for the medication because she no longer had secondary coverage through the Med-QUEST health care plan. The pharmacy had called Med-QUEST for verification that the complainant was covered by Medicaid so that the pharmacy could bill Medicaid for the co-payment and provide the medication to the complainant. However, Med-QUEST could not verify the complainant's Medicaid coverage or that the complainant's co-payment was covered, so the pharmacy referred the complainant to the Med-QUEST worker. The complainant was unable to reach her Med-QUEST worker for two weeks and therefore contacted our office for assistance.

We contacted a Med-QUEST supervisor, who informed us that the complainant's case was not assigned to the Med-QUEST worker whom she was trying to reach. Thus, Med-QUEST referred the complainant to her eligibility worker at the Benefit, Employment and Support Services Division (BESSD) because she received financial and food stamps assistance in addition to medical assistance.

We then contacted the BESSD worker, who was aware of the complainant's situation. The BESSD worker informed us that with regard to medical assistance, she only determines whether an applicant is eligible for assistance. She thought there may be a glitch in the system if Med-QUEST did not know that the complainant was under its Medicaid program. Since the complainant reported that the Med-QUEST worker did not respond to her, the BESSD worker had referred the complainant to our office.

Based on our call, the BESSD worker consulted her supervisor, who followed up and learned that the Med-QUEST enrollment center had not inputted the complainant's name into the system, which should have been done on September 1, 2008 when the complainant became eligible for Medicaid. After the supervisor's inquiry, the Med-QUEST enrollment center

inputted the complainant as a Medicaid participant on October 8, 2008. The supervisor verified that the pharmacy was made aware that the complainant was covered by Medicaid, so Medicaid would be responsible for her co-payment and the complainant would be able to receive her medication.

We contacted the complainant and confirmed that she was able to obtain her medication from the pharmacy without having to pay the co-payment.

(09-01638) Denial of Medicaid application. A woman complained that her deceased mother's application for Medicaid was denied by the Med-QUEST Division (Med-QUEST), Department of Human Services. Her mother had been a patient in a nursing home when she applied for Medicaid, but she passed away before a decision was made on her eligibility. Subsequently, her application was denied because she was deemed to have assets which exceeded the limit allowed by Medicaid rules. As a result of the denial, the nursing home billed the family for its services.

The complainant provided us with copies of her mother's financial documents which she had sent to Med-QUEST. Her mother was determined to be ineligible for Medicaid because the balance in her checking account was $3,854, which exceeded the maximum allowable asset limit of $2,000.

We confirmed that the balance in the complainant's mother's checking account was $3,854. In the month that she applied for Medicaid, direct deposits for a pension, a monthly Social Security check, and a civil service annuity payment totaling $3,045 were made to her checking account. We found, however, that in addition to counting the deposited $3,045 as income, Med-QUEST also counted the $3,045 as an asset. It appeared questionable that the amount of her direct deposit would be counted as both income and an asset.

We contacted a Med-QUEST supervisor and questioned whether the amount deposited into the complainant's mother's checking account should be counted as an asset if it were also counted as income for the same month. The supervisor informed us that the amount should be counted as income for the month, but should not also be counted as an asset in the same month. He informed us that he would review the applicant's file.

Subsequently, the supervisor informed us that Med-QUEST staff erred and the amount deposited in the complainant's mother's checking account should not have been counted as an asset, so her assets actually did not exceed the allowable limit. However, it was also determined that her $3,045 income was greater than the medical assistance standard for a single person, so a monthly "cost share" would be applicable. The "cost share"

represented the portion of her monthly medical bills that the complainant's mother would have to pay, after which Medicaid would pay the remaining portion.

We informed the complainant that after a redetermination was completed by Med-QUEST, her mother was found to be eligible for Medicaid assistance. We explained that her mother would be responsible for the "cost share" portion of the nursing home bills, and that the nursing home would need to submit a claim to Medicaid for payment of the remaining balance.

The complainant was grateful for our assistance.

(09-02608) Recertification of food stamps benefits. Upon receipt of notice that its food stamps certification is about to expire, a household must apply for an eligibility redetermination prior to the end of the certification period in order to continue to receive food stamps without interruption.

A food stamps recipient received a notice dated January 13, 2009 informing her that a redetermination eligibility interview was scheduled for February 6, 2009. The notice informed the recipient that if she did not attend the interview, her food stamps would be terminated at the end of February 2009.

The recipient, however, had appointments for a medical procedure, a therapy session, and another meeting scheduled on February 6, 2009. The appointments conflicted with her redetermination interview and she was unable to reschedule these appointments, so she asked her food stamps worker to reschedule her interview. The worker informed her that the earliest rescheduled interview would be on April 7, 2009. The recipient complained to our office that having to wait two months for a rescheduled interview was unreasonable.

We spoke with the complainant's food stamps worker who informed us that he was not informed by the complainant of the reasons she requested a rescheduled interview. The earliest available interview date was April 7, 2009 because due to the poor economy, there was a large increase in public assistance applications, as well as a moratorium on the department's hiring of additional staff to process applications. As a result, applicants and recipients had a longer wait for interviews.

We reviewed Title 17, Chapter 648, Hawaii Administrative Rules (HAR), titled "Eligibility Redeterminations." Section 17-648-12, HAR, states in part:

Eligibility redetermination. (a) The department shall act on applications for redetermination as follows:

. . . .

(4) The department shall not continue benefits due to the household beyond the certification period unless the household has been recertified.

(b) The department shall provide each household with notification of the end of its certification and the need to be recertified as follows:

. . . .

(2) A household entitled to receive a notice of expiration shall receive it not earlier than the first day nor later than the last day of the month preceding the household's last month of certification. . . .

(3) The department shall include with the notice of expiration a scheduled appointment for an interview and an application or eligibility redetermination form. . . .

. . . .

(c) In order to retain its right to uninterrupted benefits, the household receiving a notice of expiration shall attend any interview scheduled by the department on or after the date an application is timely filed.

. . . .

(2) The department shall schedule the interview on or after the date the application was timely filed if the interview has not been previously scheduled, or the household had failed to appear for any interview scheduled prior to this time and has requested another interview; . . .

We were concerned that if the complainant was not interviewed and her eligibility redetermination was not completed in February, there would be an interruption in her receipt of food stamps. We spoke with the worker's supervisor and explained our concern. The supervisor determined that the complainant had a reasonable basis to request a rescheduled interview. The

supervisor telephoned the complainant and asked her to submit her application and rental agreement by February 15, 2009. Since the complainant's only source of income was her financial assistance and she did not have any assets, she was not required to submit any other verification. The supervisor informed us that the complainant would be interviewed over the telephone after the requested documents were received, as she was considered disabled and therefore met the criteria to waive the face-to-face interview requirement.

We later spoke with the complainant, who confirmed the accommodation that was made by the supervisor.

(09-02609) Unreasonable delay in receipt of food stamps. In February 2009, a woman who received financial assistance and food stamps complained that after she submitted an application in October 2008 to increase her household size by adding her husband and newborn daughter, only her financial assistance was increased and her food stamps benefits remained the same. The complainant explained that she had submitted the application after her husband returned to the family in August 2008 and her daughter was born in October 2008.

Upon inquiry with the Benefit, Employment and Support Services Division (BESSD) worker, we learned that the worker had not processed the household's food stamps because she was behind in her work due to an increase in public assistance applications. According to the worker, the complainant's reporting of the increase in her household size did not meet the deadline for the household to receive increased food stamps for October and November 2008. When we questioned the basis for this decision, the worker informed us that she would need to further review the case.

We reviewed the BESSD rules in Title 17, Chapter 680, Hawaii Administrative Rules (HAR), titled "Eligibility and Benefit Determination." Section 17-680-34, HAR, states in part:

> <u>Changes in household composition.</u> (a) When the household reports a new member, the department shall:
>
> (1) Prospectively determine the household's eligibility by considering the income, deductible expenses, and assets of the new member as well as other factors of eligibility;
>
> (2) <u>If the new member has met all the program requirements, the department shall include the new member in the household composition</u>

> effective the month following the month in which the household reported the change. (Emphasis added.)

Since the complainant reported her husband and daughter as new members of her household in October 2008 and had otherwise met all program requirements, it appeared that the increase in food stamps the household was to receive should take effect in November 2008. When we spoke with the complainant's worker again, she informed us that she would issue food stamps to the complainant's household retroactively to November 2008 based on the above-quoted rule.

We informed the complainant that she would receive food stamps retroactively to November 2008. We explained that since she added her husband and newborn baby to the household on October 21, 2008, the addition to her household took effect the month after she reported the change.

(09-03204) Denial of request to review entire case record to prepare for appeals hearing. An applicant was denied medical assistance by the Med-QUEST Division (Med-QUEST) and filed an appeal with the Administrative Appeals Office (AAO), Department of Human Services, through his authorized representative.

On the day before the appeals hearing, the representative requested the opportunity to review the applicant's case record. A Med-QUEST unit supervisor denied the request and informed the representative that it was not necessary for her to review the case record because Med-QUEST had already provided the applicant with copies of documents from the case record that were relevant to the hearing. The hearing was held as scheduled and the applicant lost his appeal. The representative then complained to our office about the denial of her request to review the case record.

We reviewed Med-QUEST rules in Title 17, Chapter 1703, Hawaii Administrative Rules (HAR), titled "Administrative Appeals." According to the rules, the applicant or his authorized representative has a right to examine the case record prior to the hearing. Specifically, Section 17-1703-5, HAR, states:

> Rights of the claimant. The claimant or the authorized representative shall have an opportunity to:
>
> (1) Examine the case record as well as all documents and records to be used at the hearing at a reasonable time before the date of the hearing as well as during the hearing; . . .

We contacted the unit supervisor regarding his denial of the complainant's request to review the case record. The supervisor informed us that the complainant requested to review the entire case record, including documents that were not relevant to the hearing. Since the applicant had already been provided with all the materials that were relevant to the hearing, the supervisor did not believe there was any reason for the complainant to review the entire case record.

It appeared, however, that the above-quoted rule allows a claimant or authorized representative access to the entire case record in addition to the documents and records to be used at the appeals hearing. We found that the denial of the representative's request to review the entire case record was contrary to the rule. Furthermore, we believed that by allowing review of the entire case record, the department assures the claimant or authorized representative that information is not being withheld.

We contacted the Med-QUEST eligibility branch administrator and informed him of the complaint and our findings. The administrator agreed that the representative should have been provided access to the entire case record. The administrator informed the unit supervisor who had denied the representative's request that the representative should have been provided access to the entire case record. Subsequently, the representative was allowed to review the entire case record, even though the appeal decision would be unaffected.

In the course of our investigation, we learned that the AAO assists in training the department's new employees in their responsibility regarding the disclosure of public records under State law. We informed the AAO administrator of our findings and she informed us that she would instruct new employees regarding disclosure of the entire case record under Section 17-1703-5, HAR, in the training sessions she conducts.

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

(09-01007) Erroneous computation of deadline to appeal denial of unemployment benefits. A woman complained that her appeal of the denial of her unemployment benefits claim was denied on the basis that the appeal was untimely filed.

The complainant's claim for unemployment benefits was denied by the Unemployment Insurance Division (UID) on May 30, 2008 because it was determined that she was terminated by her employer for misconduct. She filed an appeal of the denial on June 30, 2008, an appeals hearing was held on August 21 and continued on August 26, 2008, and the appeals officer

rendered a decision on September 9, 2008. In her decision, the appeals officer stated that the denial of the claim was mailed to the complainant's home address on May 30, 2008 and the ten-day deadline to file an appeal was June 9, 2008. The appeals officer also stated that the statute permits the department to extend the deadline to thirty days for good cause, but that the complainant's appeal was filed beyond the extended thirty-day good cause deadline. Thus, the complainant's appeal was dismissed as being untimely and no determination was made as to whether there was good cause to extend the deadline to thirty days or whether the denial of the claim for benefits was proper.

We reviewed Chapter 383, Hawaii Revised Statutes (HRS), titled "Hawaii Employment Security Law." The appeals officer's decision was based on Section 383-38, HRS, which states in part:

> **Appeals, filing, and hearing.** (a) The claimant or any other party entitled to notice of a determination or redetermination as herein provided may file an appeal from the determination or redetermination at the office of the department in the county in which the claimant resides or in the county in which the claimant was last employed, or with a copy of the contested determination at the employment security appeals referee's office, <u>within ten days after the date of mailing of the notice to the claimant's or party's last known address, or if the notice is not mailed, within ten days after the date of delivery of the notice to the claimant or party. The department may for good cause extend the period within which an appeal may be filed to thirty days</u>. Written notice of a hearing of an appeal shall be sent by first class, nonregistered, noncertified mail to the claimant's or party's last known address. (Emphasis added.)

The complainant stated that she was having problems with mail delivery to her home and that she did not receive the denial letter. The UID records confirmed that the complainant reported a new mailing address on June 13, 2008.

We spoke with the appeals officer's supervisor about the decision, which did not indicate that the appeals officer determined whether there was good cause for the complainant to have missed the ten-day deadline to file an appeal before dismissing the appeal. We brought to the supervisor's attention a provision in Chapter 1, HRS, titled "Common Law; Construction of Laws." Section 1-29, HRS, states in part:

> **Computation of time.** The time in which any act provided by law is to be done is computed by excluding the first day and including the last, <u>unless the last day is a Sunday</u> or holiday and <u>then it is also excluded</u>. . . . (Emphasis added.)

In this case, since the date of the decision to deny the complainant's claim for unemployment benefits was May 30, 2008, the extended thirty-day good cause deadline would be June 29, 2008. However, since June 29, 2008 was a Sunday, it is excluded pursuant to Section 1-29, HRS, and the thirtieth day for the extended good cause deadline was June 30, 2008. Since the complainant filed her appeal on June 30, 2008, her appeal was timely.

We asked the supervisor whether the appeals officer should have considered the complainant's appeal to be timely and, if so, whether the appeals officer should have decided if there was good cause for the complainant to have missed the ten-day deadline to file an appeal. If good cause existed, the appeals officer would need to decide on the merits of the appeal, i.e., whether the complainant's disqualification for misconduct was proper.

Subsequently, the supervisor agreed that the complainant's appeal should be considered as having been filed within the extended thirty-day good cause deadline. She informed us that the appeal would be remanded to the appeals officer to reopen the case and to decide whether good cause existed for the complainant to have missed the ten-day deadline to file an appeal.

We informed the complainant of the supervisor's decision. Before the case could be reopened, however, the complainant filed an appeal in circuit court so any further action on the part of the appeals office became unnecessary.

(09-03157) Not informed of work registration requirement for unemployment benefits. According to Hawaii law, in order to be eligible for unemployment benefits an unemployed individual must register for work with an employment office or other such place as the department may approve prior to or within seven calendar days after filing a claim for benefits.

A man complained that his Unemployment Insurance Division (UID) intake worker did not inform him of the work registration requirement when he met with her at the UID office to file a claim. As a result, he was denied unemployment benefits for the first two weeks following his filing of the claim. The complainant stated that during his interview the intake worker was interrupted by constant incoming telephone calls. He stated that the worker only provided him with a document that included information about weekly claim filing dates and that required him to submit his pay statements to verify his recent employment. The document, however, failed to mention any work registration requirement.

When the complainant met with a UID claims examiner later in the month and turned in his pay statements, the examiner informed him that his

unemployment benefits were denied because he failed to register for work prior to or within seven calendar days of his filing of the claim. The complainant subsequently registered for work, but also appealed the two-week denial of his benefits. After an appeals hearing was held, the appeals officer upheld the denial of benefits.

After reviewing the unemployment laws and appeals decision, we spoke with the claims examiner to ascertain what happened. She informed us that the information provided to the complainant by the intake worker was not documented. The intake worker's recollection was that she advised the complainant to register for work and the complainant questioned the registration requirement since he had registered for work when he filed a previous claim, which had since become inactive. The intake worker said she advised the complainant to return within seven days with his pay statements because the UID office did not have any information on his wages. The complainant did not return within seven days, so the intake worker telephoned and reminded him to bring his pay statements. It was due to this call that the complainant returned to the office later in the month and first became aware of the work registration requirement.

The claims examiner informed us that claims are usually taken over the telephone, at which time a checklist is automatically generated. The checklist is used to document information that is provided a claimant about requirements to receive unemployment benefits. However, a large increase in claims due to the high unemployment rate made it difficult at times to reach the UID office by telephone, so some claimants filed claims in person and a checklist was not generated for such claimants. Thus, there was no documentation of the information provided to the complainant.

Subsequently, the claims examiner informed us that due to the complaint we received, her office was in the process of drafting a form to use when individuals file claims in person. It would be similar to the form used when claims are taken over the telephone and would include a checklist of information and forms to be provided to persons who filed their claims in person. The completed form would document the information and forms that were provided to a claimant.

We informed the complainant of the intake worker's recollection and that we were unable to determine whether he was or was not informed of the work registration requirement at the time he filed his claim. Thus, we were unable to recommend that he be paid the two weeks unemployment benefits that he missed. However, we believe that the form developed by the UID office would assist both claimants and UID staff in the processing of claims in the future.

(09-03898) Erroneous referral to the Labor Appeals Board. A woman complained that the Disability Compensation Division (DCD) erroneously treated her written inquiry as an appeal and referred her case to the Labor Appeals Board (LAB).

While employed at a private hospital, the complainant suffered a work injury and received workers' compensation benefits. She entered into a stipulated agreement with her employer in 2001, whereby the employer agreed to continue to pay for medical treatment required by the injury. However, in 2008 the employer stopped its payments based on the findings of an independent medical examiner. Subsequently, the director of the Department of Labor and Industrial Relations issued an order that the complainant's physician shall submit a treatment plan for any further medical care, services, and supplies that were required for treatment of the injury and the employer shall continue to pay for the complainant's treatment. Despite the director's order, the employer did not resume its payments.

The complainant wrote to the DCD and received a response that acknowledged the receipt of her request for a hearing. The DCD informed her that it forwarded her letter to the LAB for the scheduling of an appeals hearing. The complainant maintained that she did not request a hearing and that she wished to resolve the matter through the DCD. We were aware that an LAB hearing would entail a time-consuming process during which the DCD would take no action on her case.

We obtained a copy of the letter that the complainant sent to the DCD. We found that the complainant did not request a hearing and instead stated that she interpreted the 2001 stipulated agreement to mean that her employer shall pay for medical care, services, and supplies once a treatment plan was submitted by her doctor. She requested written confirmation from the DCD that her interpretation of the stipulated agreement was correct.

We contacted the DCD administrator and informed him of the complaint and the apparent misinterpretation of the complainant's letter. After reviewing the letter, the administrator acknowledged that the referral to the LAB to schedule a hearing was erroneous. The administrator informed us that he would write to the LAB to cancel the referral for a hearing and would write to the complainant to respond to her request for clarification of the 2001 stipulated agreement.

We received a copy of the DCD administrator's letter to the complainant, in which the administrator noted that the request by the complainant's physician for the purchase of medical equipment failed to include justification of the purchase as reasonable treatment of the injury. The administrator noted that treatment plans submitted by her physician may be denied by the employer and if the complainant disagrees with the denial, the complainant may request a hearing to challenge the denial. The

administrator also informed the complainant that the case would be returned to the director's jurisdiction for review of the employer's denial of the request to purchase the medical equipment.

The complainant was pleased with the action taken by the DCD administrator.

DEPARTMENT OF LAND AND NATURAL RESOURCES

(08-02161) State-owned property unavailable for lease. A man complained that the Department of Land and Natural Resources (DLNR) was not providing him the opportunity to lease a State-owned parcel. The DLNR informed him that the Department of Transportation (DOT) controlled the parcel and had leased it to a company that was using the parcel to park its trucks. When the complainant inquired with the DOT, the DOT informed him that the parcel was being held for a road widening project. However, the complainant learned that the road widening project had been completed. He contended that the DOT should have returned the parcel to the control of the DLNR.

In our investigation, we reviewed Chapter 171, Hawaii Revised Statutes (HRS), titled "Management and Disposition of Public Lands." Section 171-11, HRS, authorizes the governor, with the prior approval of the Board of Land and Natural Resources, to set aside public lands to another State department for public use or purpose. Section 171-11, HRS, states in part:

> **Public purposes, lands set aside by the governor; management.** The governor may, with the prior approval of the board of land and natural resources, set aside public lands to any department or agency of the State, the city and county, county, or other political subdivisions of the State for public use or purpose. . . .
>
> . . . .
>
> . . . Such department, agency of the State, the city and county, county, or other political subdivisions of the State in managing such lands shall be authorized to exercise all of the powers vested in the board in regard to the issuance of leases, easements, licenses, revocable permits, concessions, or rights of entry covering such lands for such use as may be consistent with the purposes for which the lands were set aside . . . .

The law also provides that when the land is no longer being used for the public purpose for which it was set aside, the land should be returned to the DLNR. Section 171-11, HRS, states:

> Whenever lands set aside for a public purpose to the various departments and agencies of the State, or to any city and county, county, or other political subdivisions of the State, or to the United States, are not being utilized or required for the public purpose stated, the order setting aside the lands shall be withdrawn and the lands shall be returned to the department. . . .

We contacted the DOT to review the governor's executive order setting aside the parcel in question. The DOT informed us that the DLNR made the parcel available for the DOT's road widening project by memorandum dated July 18, 1956. The DOT produced a letter dated March 24, 1983 in which the DOT requested that the DLNR forward a copy of the executive order setting aside the requested parcel. The DOT informed us that the DLNR never provided a copy of an executive order. We then inquired with the DLNR, which informed us that it had no record of an executive order setting aside the parcel in question.

Without an executive order setting aside the parcel to the DOT, we believed that the DLNR was still responsible for the parcel. We recommended that the DLNR exercise its rightful control over the parcel, but the DLNR informed us that it could not terminate the lease with the current tenant because the DLNR was not a party to the lease and the DOT was the contracting party. The DLNR further informed us that the property would need to be cleaned of industrial waste before the DLNR would accept it. Since the DOT no longer required the parcel for its road widening project, we asked the DLNR to work with the DOT to terminate the current lease, clean the parcel, and have the parcel returned to the DLNR.

After several months of discussion, the DLNR informed us that the DOT was terminating the current lease. The DLNR asked the DOT to conduct an environmental assessment to determine the level of cleaning the parcel required and stated its intent to subsequently conduct a public auction for a long-term lease of the parcel.

We informed the complainant of the action being taken. He was pleased that he would eventually have the opportunity to bid for the lease.

(08-04486) Recordation of liens without the required court orders. Our office previously investigated a complaint that the Bureau

of Conveyances (BOC), Department of Land and Natural Resources (DLNR), accepted for filing a nonconsensual common law lien that was not accompanied by a certified court order.

In our investigation of the previous complaint, we reviewed Chapter 507D, Hawaii Revised Statutes (HRS), titled "Nonconsensual Common Law Liens and Frivolous Financing Statements." We found that a "nonconsensual common law lien" is defined in Section 507D-2, HRS, and that Section 507D-5, HRS, required that a certified court order be presented to the registrar prior to the recordation of a lien with the BOC. Our review of the relevant provisions of Sections 507D-2 and 507D-5, HRS, respectively, revealed the following language:

> §507D-2 Definitions. . . .
>
> . . . .
>
> "Nonconsensual common law lien" means a lien that:
>
> (1) Is not provided for by a specific statute;
>
> (2) Does not depend upon, require by its terms, or call for the consent of the owner of the property affected for its existence; and
>
> (3) Is not a court-imposed equitable or constructive lien.
>
> . . . .
>
> §507D-5 Requirement of certified court order. . . .
>
> (b) Any claim of nonconsensual common law lien against a private party in interest shall be invalid unless accompanied by a certified order from a state or federal court of competent jurisdiction authorizing the filing of nonconsensual common law lien.
>
> (c) The registrar shall not accept for filing a claim for nonconsensual common law lien unless the claim is accompanied by a certified state or federal court order authorizing the filing of the lien.

Thus, in the absence of a certified court order, the BOC should not record any nonconsensual common law lien. The DLNR consulted the Department of the Attorney General (AG) and the AG advised against the

BOC's recordation of a nonconsensual common law lien unless the lien is accompanied by a certified State or Federal court order authorizing the filing of the lien.

In our discussion with the BOC registrar, it was our understanding that the BOC would thereafter comply with the AG advisory. Thus, we closed the case in our files.

In our investigation of a complaint several months later, however, we learned that the BOC was continuing the practice of recording nonconsensual common law liens even when not accompanied by certified State or Federal court orders authorizing the filing of the liens.

We found the BOC's continuation of its old practice, after the provisions of Sections 507D-2 and 507D-5, HRS, were brought to its attention and against the advice it received from the AG, to be inexplicable. We wrote to the DLNR chairperson and asked her to review this matter.

Subsequently, the chairperson wrote to us and informed us that she reviewed our letter with the new BOC registrar and that the BOC would cease the registration of nonconsensual common law liens that are not accompanied by certified State or Federal court orders.

(09-02260) Outdated annual passes. According to law, the Department of Land and Natural Resources is authorized to charge user fees for permits, parking, and entrance to the Diamond Head State Monument. A woman complained that an annual pass she purchased to visit the park was "outdated."

In January 2009, the complainant went to Diamond Head State Monument and purchased an annual pass. However, the year 2007 was printed on the pass. When the complainant brought this to the attention of the park staff, a staff member crossed out "2007" with a pen and wrote "2009" on the pass. Additionally, the staff wrote on the front and the back of the pass that the pass expired in January 2010. When the complainant asked for a 2009 pass, she was told that there was no need for another pass since the correction was already made to her pass. The complainant said she was given a generic receipt that did not indicate it was from the State of Hawaii, but that "State of Hawaii" is printed on receipts from other State agencies.

We contacted the Diamond Head State Monument coordinator and learned that the State Parks Division contracted a private company to collect the entrance fee, including the annual pass fee. The contractor had a surplus of annual passes from 2007, so to save money the coordinator authorized the contractor to use the surplus passes. In 2008 and early 2009,

staff wrote in the purchase date and current one-year expiration date on each pass, even though "2007" was printed on the passes. The contractor kept a record of the passes that were sold. Each pass was numbered and when a pass was sold, the contractor recorded the name of the purchaser, the date of purchase, and the number of the pass. The contractor did not provide a receipt, as the pass served as a receipt.

In the course of our investigation, we learned that the contractor had exhausted all of the 2007 surplus passes. Thus, the practice about which the woman had complained had ceased.

We recommended to the Diamond Head State Monument coordinator that in the future, the private contractor be required to use annual passes on which a year was not preprinted. Instead, the contractor could write the beginning and expiration dates on the pass at the time of sale. The coordinator informed us that is what they would do in the future.

DEPARTMENT OF PUBLIC SAFETY

(09-00012) Required to use recreation time for other activities. According to Department of Public Safety (PSD) policy, correctional facilities are required to provide for all inmates a recreation program that includes active indoor and outdoor activities, quiet indoor activities, hobby craft activities, and cultural awareness activities whenever possible. The recreation program objectives are to provide opportunities for inmates to develop and maintain physical fitness, to learn and practice constructive use of leisure time, and to create positive interaction among inmates, as well as between staff and inmates. Furthermore, PSD policy requires inmates in segregation to be provided, at a minimum, with one hour of exercise per day, five days per week, either indoors or outdoors. Exceptions are allowed for inclement weather, emergency situations, or where institutional security is directly threatened.

An inmate complained that the staff at a correctional facility allowed inmates in segregation to shower and make telephone calls only during their one-hour recreation time. As a result, the inmates were unable to have a full hour of recreation on a daily basis. The complainant filed a grievance and the response stated that he had to choose which activities he wanted to do during his one hour of recreation.

We reviewed the PSD policies and procedures regarding recreation and leisure time, telephone privileges, and personal hygiene. There was no provision designating showering and making telephone calls as recreational activities.

We contacted the facility's chief of security, who informed us that the practice described by the complainant had been in force for a very long time and that he supported its continuation. We then spoke with the warden, who confirmed that the practice was a long-standing one. At his request, we provided the warden with copies of the PSD policies and procedures that we reviewed. The warden informed us that he would consult the division administrator to ascertain the use of recreation time at other facilities.

Shortly thereafter, the warden sent us a copy of a memo that he issued to his watch commanders directing that immediately all inmates in segregation would be allowed 15 minutes to shower in addition to their one hour of recreation time. The memo further instructed that all legal calls were to be considered separate and in addition to any scheduled recreation and shower periods.

We notified the grateful complainant of the results of our investigation.

(09-00048) Duplicate misconduct charges. An adult corrections officer (ACO) discovered a razor blade attached to the end of a plastic toothbrush handle under the pillow of an inmate. The inmate was charged with misconduct and the facility adjustment committee (Committee) found the inmate guilty of possession of a weapon and possession of an unauthorized tool. The inmate claimed that he was innocent and complained that he was framed.

We reviewed the Committee report and the staff incident and investigation reports. We found that pursuant to the Department of Public Safety (PSD) Policy No. COR.13.03, "Adjustment Procedures Governing Serious Misconduct Violations and the Adjustment of Minor Misconduct Violations," the complainant was charged and found guilty of the following:

1. 13.03.4.0.2a.6(10) -- Possession, introduction or manufacture of any firearm, weapon, sharpened instrument, knife or other dangerous instrument.

2. 13.03.4.0.3a.7(8) -- Possession of an unauthorized tool.

The Committee sanctioned the complainant with 60 days in disciplinary segregation for the first violation and 30 days for the second.

The Committee determined that the sanctions would be served concurrently, so the complainant would serve a total of 60 days in segregation.

Based on the staff reports, we found there was sufficient evidence to conclude that the complainant was in possession of the toothbrush handle with razor blade, which was reasonably construed to be a weapon or dangerous instrument. Thus, we determined the Committee's finding that the complainant was guilty of possessing a weapon or dangerous instrument to be reasonable.

We noted, however, that the staff reports did not indicate any item other than the toothbrush handle with razor blade was found in the complainant's possession. Thus, we concluded that there was no basis for the charge of possession of an unauthorized tool and we suspected that this second charge was based on the complainant's possession of the same toothbrush handle with razor blade for which he was already found guilty.

We contacted the facility warden, who confirmed that both charges were based on the complainant's possession of the toothbrush handle with razor blade. We attempted to persuade the warden that the less severe charge of possession of an unauthorized tool was duplicative of the charge of possession of a weapon or dangerous instrument and should be expunged. However, the warden declined to act because the complainant had filed a grievance to the warden's superior.

We contacted the PSD director and explained why we believed the charge of possession of an unauthorized tool was duplicative. Shortly thereafter, the director informed us in writing that he agreed with our finding and that the charge of possession of an unauthorized tool would be expunged from the complainant's record.

We reported to the complainant that we believed there was a reasonable basis to find him guilty of the first charge and informed him of the expungement of the second charge by the PSD director. He thanked us for our assistance in having the second charge expunged, but maintained that he was innocent of both charges. We advised him, however, that we could not assist him further as we believed there was a reasonable basis to find him guilty of possessing a weapon or dangerous instrument.

(09-00092) Duplicate misconduct charges. An inmate complained that he was found guilty of multiple misconduct charges by the facility adjustment committee (Committee). He was found guilty of threatening an adult corrections officer (ACO), using abusive language, failing to follow safety and sanitary rules, and disobeying an order.

In our investigation we reviewed the staff reports regarding the incident, the Committee findings and disposition, and the Department of Public Safety (PSD) policy and procedure on the adjustment procedures for handling rule violations.

According to an ACO's report, the ACO observed the complainant toss his dinner roll onto another inmate's plate. The ACO reported that the other inmate accepted the roll from the complainant and tried to cover it with his hand so that the ACO would not see it. The ACO noted that a facility rule stated that no food items shall be passed or exchanged between inmates at anytime. The ACO approached the dining table and ordered both inmates to finish eating their meals in their own cells, to prevent anymore passing of food. The other inmate quickly went to his cell, but the complainant took his time. The ACO reported that as the complainant walked back to his cell, he made loud comments to the ACO, such as ". . . 'anytime, let's go right now, you know where I'm at'" and "'I'll take you out.'" The ACO told the complainant once more to be quiet and to quickly shut his cell door, but the complainant continued to talk loudly and slowly shut his door.

In the course of the facility's investigation of the incident, a written statement was obtained from the complainant. The complainant wrote, ". . . all I said was you know were (sic) I'm at, just come in my cell and we can settle this. I don't see how the words alone are abusive but I did want to abuse him but I didn't let him know cause I wanted him to take me up on my offer."

We concluded that the complainant's written statement supported the gist of what the ACO had reported. However, the charges of threatening the ACO and using abusive language appeared to be duplicative. Moreover, the threatening charge was classified in the PSD policy and procedure as being of the greatest severity, whereas the abusive language charge was of low moderate severity, and in our analysis of the facts of the case the abusive language charge appeared to be a lesser and included element of the threatening charge.

We contacted the facility warden and discussed the Committee findings. We agreed that there was a reasonable basis for finding the complainant guilty of threatening the ACO, failing to follow safety and sanitary rules, and disobeying an order. The warden agreed that the complainant should not have been found guilty for using abusive language. The warden stated that if the complainant had sworn, perhaps the abusive language charge would be appropriate. The warden informed us that he would expunge the guilty finding for using abusive language and we subsequently received written confirmation from the warden that the charge was expunged.

We contacted the complainant, who confirmed that he received written notice from the warden that the charge was expunged.

(09-00154) Hawaii Paroling Authority guidelines were not followed. An inmate complained that the Hawaii Paroling Authority (HPA) failed to follow its own guidelines when it set his minimum term of imprisonment.

In the Hawaii indeterminate sentencing system, the court sentences a person convicted of a felony to a maximum term of imprisonment. Thereafter, except for sentences of life without parole, the HPA determines the minimum term that the convicted felon must serve before being eligible for release on parole.

Pursuant to a 1988 amendment to Section 706-669, Hawaii Revised Statutes, the HPA is required to "establish guidelines for the uniform determination of minimum sentences which shall take into account both the nature and degree of the offense of the prisoner and the prisoner's criminal history and character."

In 1989 the HPA established the required guidelines, which included criteria for determining minimum terms, such as the nature of the offense, the degree of injury or loss to the victim, and the criminal history of the inmate. The guidelines provide three levels of punishment, each with a range of minimum terms, to be applied to maximum sentences of 5, 10, and 20 years, as well as to a maximum sentence of life with the possibility of parole. The guidelines further state that a minimum sentencing order will include the inmate's level of punishment and the criteria on which the decision was based.

The complainant in this case was convicted of murder in the second degree and was sentenced by the court to a maximum term of imprisonment of life with the possibility of parole. On February 3, 1997, the HPA set his minimum term at 30 years. However, the HPA Notice and Order Fixing Minimum Term of Imprisonment (Order) did not state the complainant's level of punishment.

The complainant wrote to the HPA and asked that it adjust his minimum term according to its guidelines, citing the Hawaii Supreme Court decision in *Coulter v. Hawaii,* dated November 30, 2007. In the *Coulter* case, the Hawaii Supreme Court agreed with the plaintiff's assertion that the HPA failed to follow its own guidelines when it set his minimum term without stating the level of punishment or providing written justification in the Order. The court noted that the composition of the three-member HPA had changed since the plaintiff's original minimum term had been established, and

remanded the case to the lower court to enter an order for the HPA to hold a new hearing to determine the plaintiff's minimum term of imprisonment.

The HPA chair responded to the complainant that his minimum term established by the parole board remained appropriate. Thereafter, the inmate complained to our office.

In our inquiry with HPA staff, we noted that the complainant's circumstance was similar to that of the plaintiff in the *Coulter* case and we questioned whether he should be afforded a new hearing to set his minimum term. Subsequently, the HPA staff wrote to the complainant and informed him that if it was his intent to request a new hearing, he should write to HPA staff and a new hearing would be scheduled.

The complainant wrote to the HPA but subsequently complained to our office that the HPA chair again denied his request for a new hearing and stated that the decision by the parole board remained appropriate.

We again inquired with HPA staff and learned that the complainant did not cite the *Coulter* case when he made the request for a new hearing. Instead, in his letter the complainant argued that his minimum term was too long and requested a hearing on that basis. We asked HPA staff to inform the HPA chair that the complainant was requesting a new hearing based on the Hawaii Supreme Court ruling in the *Coulter* case.

Subsequently, the HPA staff wrote to the complainant and informed him that the HPA would schedule a new minimum term hearing.

(09-00167) Handling of correspondence containing confidential health care information. An inmate complained that the facility mail room did not consider his mail to and from the State Medical Claims Conciliation Panel (MCCP) to be privileged correspondence. Instead, his correspondence with the MCCP was treated as regular mail and was therefore subject to being read and censored by mail room staff. The complainant stated that his correspondence with the MCCP often contained protected health care information and therefore should be treated confidentially.

According to Chapter 671, Hawaii Revised Statutes (HRS), titled "Medical Torts," any person who alleges that a medical tort has been committed must first submit a claim to the MCCP before filing a lawsuit. Section 671-1, HRS, defines a medical tort as "professional negligence, the rendering of professional service without informed consent, or an error or omission in professional practice, by a health care provider, which proximately causes death, injury, or other damage to a patient."

A panel is formed for each claim that is filed. A panel consists of a chairperson who is experienced in the personal injury claims settlement process, an attorney experienced in trial practice, and a licensed physician or surgeon. The panel reviews the claim and renders findings and advisory opinions on the issues of liability and damages.

We reviewed the Department of Public Safety correspondence policy, which provided that privileged mail shall be subject only to inspection for contraband in the presence of the inmate and shall not be subject to censorship. The facility policy contained the same provision, but defined privileged mail as correspondence between an inmate and certain government agencies and officials, such as the governor, the attorney general, the courts, elected State and Federal officials, and the ombudsman's office. An inmate's correspondence with the MCCP was not considered to be privileged.

As we were concerned that an inmate's correspondence with the MCCP is very likely to contain confidential health care information, we discussed the complaint with the correctional facility's clinical services administrator (CSA). The CSA informed us that once a case has been established with the MCCP, inmates are allowed to request copies of their medical records from the facility and are allowed to mail the records directly to the MCCP. The CSA believed that mail to the MCCP should be considered privileged because it contains personal health care information. The CSA suggested that we contact the facility's business manager, who oversees the mail room operations.

We contacted the business manager, who suggested that this issue be handled on a case-by-case basis by the case managers. The complainant was directed to give his MCCP correspondence to his case manager so that it would not be handled as regular mail and would not be censored.

In order to ensure uniformity in the manner in which individual case managers handle inmate correspondence with the MCCP, we contacted the facility's deputy warden and apprised him of our concern. The deputy warden suggested that he issue a memorandum reminding all concerned that when health care information regarding the MCCP is handled, relayed, or changes hands, it needs to be treated with the utmost confidentiality. Thereafter, the deputy warden provided our office with a copy of his memorandum, which included a warning that failure to follow the directive may result in disciplinary action.

(09-00471) Inmate improperly charged for a store order. An inmate was hospitalized for a month. When he returned to the correctional facility, he found that items he ordered from the inmate store before going to

the hospital were placed with his belongings and he had been charged for the items. He complained that he should not be charged for the store order because he did not sign for the order when it was delivered and he no longer wanted the items.

The facility operated an inmate store where approved items such as candies, snacks, and hygiene items may be purchased by inmates. An inmate completes a store order form identifying items he wants to purchase and then signs the form to authorize the facility to charge his account. Upon receipt of the items, the inmate signs a form to acknowledge receipt of the items he ordered.

We contacted the staff at the inmate store. We were told that if an inmate is too ill to sign the store order receipt, an adult corrections officer (ACO) may sign for the inmate and the ordered items are placed with the inmate's belongings. If an ACO knows that an inmate would return soon from the hospital, the ACO may sign the receipt for the inmate and the ordered items are set aside and given to the inmate when he returns. If an ACO does not sign the receipt, the order is returned to the inmate store.

In the complainant's case, no ACO signed the receipt for the complainant but the complainant nevertheless received the ordered items when he returned from the hospital. The staff at the inmate store refused to accept the ordered items back from the complainant and stated that all sales were final.

Because of conflicting information we received, we spoke with the administrator of the facility business office. We were informed that staff should not have delivered the store order when the complainant was in the hospital and the ACO should not have accepted the order. Instead, the order should have been returned to the store and the complainant could place a store order after he returned from the hospital. Moreover, the administrator informed us that an ACO should not sign the receipt for a store order on behalf of an inmate. The administrator informed us that the complainant would be reimbursed the amount of the store order.

We verified that the complainant's account was credited and informed the grateful complainant of the action taken.

(09-00748) Misconduct report listed erroneous charge. In June 2008, a Hawaii inmate being held in a correctional facility on the mainland complained that there was an error in a misconduct report that was filed against her in January 2005 when she was incarcerated at a Hawaii correctional facility. The complainant contended that she was found guilty of assaulting another inmate, but the report erroneously stated that she was found guilty of escape.

Department of Public Safety (PSD) Policy No. COR.13.03 lists prohibited conduct. The complainant informed us that the misconduct report filed against her in 2005 stated she was found guilty of violating Section 7(4), "Escape from an open institution or program, conditional release center, work release center or work release furlough, which does not involve the use or threat of violence." She stated she was actually found guilty of violating Section 7(3), "Assaulting any person without weapon or dangerous instrument." When she told the adjustment committee chairperson (Chairperson) of the error, he admitted that it was a mistake, wrote "(3)" above the "(4)" on the misconduct report, and assured her that this was sufficient to correct the error.

The complainant was subsequently transferred from one facility to another. She did not learn that the escape remained on her record until December 2007 when she was told by the PSD Mainland Branch (MB) that she was not eligible to return to Hawaii because of the escape. The inmate stated that she made numerous attempts to have the erroneous misconduct report corrected by the Hawaii correctional facility that issued the report, but her attempts were unsuccessful.

In our investigation, we contacted the Chairperson, who confirmed that the misconduct report was erroneous. The Chairperson believed he had corrected the report. When he attempted to verify the correction, however, the Chairperson was unable to do so because the complainant's file was no longer at his facility. We inquired with the facility to which the complainant had been transferred, but her file was no longer held there as she had been transferred to the mainland facility. Finally, we found that the complainant's file was held at the MB.

We obtained a copy of the misconduct report and found, as the complainant had stated, that the number (3) was written above the number (4). However, no change was made to the stated charge, which was still described as, "Escape from an open institution or program, conditional release center, work release center or work release furlough, which does not involve the use or threat of violence." It did not appear that anyone reading the report would conclude that the complainant was found guilty of assault and not escape.

We persuaded the facility that issued the misconduct report to contact the MB to obtain the report. Thereafter, the facility issued a corrected report that made no reference to an escape and explicitly stated the complainant was found guilty of assault. The facility warden also issued a memo to explain the filing of the amended disposition. We obtained copies of the corrected report and warden's memo to verify the corrective action.

We informed the grateful complainant that the escape was no longer a part of her record.

(09-01593) Inspection of medical records by inmate. An inmate complained that he had not received a response to several requests that he made over the course of a month to his unit team manager (UTM) to schedule a time to inspect his medical records.

The complainant's requests were made in accordance with Department of Public Safety (PSD) Policy No. COR.10E.07.4.4, titled "Inmate Requesting Information From Medical Record," which states in part:

> If it is determined that the inmate is entitled to inspect his or her medical record, it shall be the inmate's responsibility to make arrangements with the UTM or security to inspect the record. The facility shall have sufficient adult correction [sic] officers (ACO) on duty to allow an ACO to stand by during the inspection.

After our attempts to reach the UTM were unsuccessful, we contacted the clinical services administrator (CSA), who was in charge of the facility's medical unit. We learned that there was a disagreement between the medical unit and the facility administration as to how to accommodate the complainant's request. The CSA informed us that the deputy warden believed that it was the responsibility of the medical staff to monitor inmates while they reviewed their medical records, whereas the medical staff felt it was a security staff function. The CSA informed us that she was following up on this issue with her supervisors and with the facility administration.

Subsequently, we learned that the CSA's supervisors did not believe that a nurse should have to sit with the complainant while he reviewed his medical records. The supervisors believed that the facility should adhere to the PSD policy by having the UTM make the arrangements for the complainant's review of his records, with an adult corrections officer (ACO) standing by during the review. We agreed that the PSD policy should be followed.

We contacted the deputy warden and learned of his concern that because the request involved the review of confidential health information, it would not be appropriate for the review to be monitored by security staff. The medical staff would typically have access to an inmate's confidential health information, whereas security staff would not, so it would be more appropriate for medical staff to monitor an inmate's review of his medical records.

While we understood the deputy warden's concerns about protecting the confidentiality of the complainant's health information, we pointed out that the department's policy required that the complainant's review of his records be monitored by an ACO, not medical staff. Since the ACO would monitor

the complainant and would not need to review the complainant's medical records, and as there were no immediate plans to change the policy, we recommended that the facility comply with the policy.

A short while later, we learned from the CSA that the complainant was able to review his medical records. The facility administration had scheduled the date and time for the review and had assigned an ACO to monitor the complainant. We subsequently confirmed with the complainant that he had reviewed his medical records.

(09-01803) Adjustment Committee erroneously found inmate guilty of misconducts. An inmate complained that a facility adjustment committee (Committee) improperly found him guilty of two charges: (1) possession of anything not authorized for retention or receipt by the inmate; and (2) refusing to obey an order of any staff member.

In our investigation, we reviewed the staff reports and the disposition of the Committee. We learned that during a shakedown of the complainant's housing unit, an adult corrections officer found a pouch which contained tobacco and rolling paper concealed in the leg of the complainant's locker. The facility did not permit inmates to possess cigarettes or any smoking paraphernalia. The complainant maintained that the tobacco pouch was not his and was found in an area that was accessible to other inmates in the housing unit. Nevertheless, the Committee found the complainant guilty of both charges.

We spoke with the facility warden. We were concerned that the complainant was found guilty for refusing to obey a staff order since there was nothing in the reports to indicate that an order had been given to the complainant. It appeared that the charge of refusing to obey an order was duplicative of the charge of possessing an unauthorized item.

The warden agreed that the Committee should not have found the complainant guilty of refusing to obey an order because no staff member gave an order to the complainant. After further review of the reports, the warden decided to expunge the guilty findings on both charges.

We informed the complainant of the action taken by the warden.

(09-02025) Denied substance abuse treatment assessment. A Hawaii inmate in a mainland correctional facility complained that he was denied an assessment for substance abuse treatment in 2008.

The complainant was incarcerated in 2002 for numerous drug offenses and underwent substance abuse treatment. He completed the

Level III treatment program and was paroled in 2005. While on parole, the complainant violated the conditions of parole by resuming his drug use. At a parole revocation hearing in February 2008, the Hawaii Paroling Authority (HPA) recommended that the complainant participate in a Level II treatment program for parole violators. However, the complainant was subsequently transferred to a correctional facility on the mainland and was informed that he would need to complete the longer Level III treatment program instead.

The complainant informed us that his parole hearing with the HPA was to be held in February 2010, by which time he hoped to have completed the appropriate substance abuse treatment program. While awaiting entry into a Level II treatment program, he requested an updated assessment for his substance abuse treatment as he was concerned that without an updated assessment he might not be assigned to the appropriate treatment program. However, the Department of Public Safety (PSD) denied his request for the updated assessment. The complainant believed that by law, he was entitled to an assessment for substance abuse treatment.

We reviewed Chapter 353G, Hawaii Revised Statutes (HRS), titled "Criminal Offender Treatment Act." Section 353G-4, HRS, states in part:

> Mandatory assessment of offenders. (a) Any inmate who has been convicted of more than one offense under chapter 329, 329C, 707, 708, 709, 710, 711, or 712, and <u>has one prior conviction under any of these chapters, shall be required to undergo an assessment if</u>:
>
> . . . .
>
> (3) <u>The inmate requests an assessment</u>; . . .
>
> (Emphasis added.)

The PSD Mainland Branch (MB) staff informed us that the complainant had four convictions for promoting a dangerous drug, a felony offense under Chapter 712, HRS. Pursuant to Section 353G-4, HRS, the substance abuse assessment that the complainant requested was mandatory.

We informed the MB staff of the mandatory assessment requirement in the law. After consulting the PSD substance abuse treatment administrator, the MB staff informed us that the complainant would receive an updated substance abuse treatment assessment.

We informed the complainant of the outcome of our investigation and he confirmed that he had been informed by PSD that an updated assessment would be completed.

(09-02061) Disapproval of visitor. According to Department of Public Safety policy, visitation is a privilege afforded to inmates rather than a right. Nonetheless, the policy states that visitation is integral to the correctional and rehabilitative process of inmates and encourages the maintenance of positive family and community ties, as well as provides a source of positive inmate motivation.

A woman complained that her son's request to have her placed on his approved visitors list at a correctional facility was denied because she allegedly had a felony conviction. The complainant denied that she was ever convicted of a felony and questioned the information that the facility relied on to deny her visits with her son.

In our investigation, we spoke with the facility's visitation officer and were informed that the complainant had a theft charge in 1973 that was a Class B felony. The visitation officer informed us that the denial of the inmate's request was based on information from the Hawaii Criminal Justice Data Center (HCJDC), which is responsible for the collection, storage, dissemination, and analysis of criminal justice data from the criminal justice agencies.

When we inquired with the HCJDC, however, we learned that the complainant was not convicted of the 1973 theft charge and the charge was dismissed. The HCJDC staff suggested that the complainant file an application to have the charge expunged from her record. We reviewed the complainant's HCJDC records and confirmed that she had no felony conviction.

We contacted the visitation officer and informed him what we learned from the HCJDC contradicted what he told us about the complainant's criminal record. Upon further review, the visitation officer confirmed the information we received from the HCJDC. As such, the visitation officer informed us that the complainant would be approved to visit her son.

We thereafter notified the complainant of the result of our investigation. The complainant informed us that she had started the process to have the theft charge expunged from her record.

(09-02479 and 09-02612) Duplicate misconduct charges. Two inmates in a work furlough program complained about being found guilty of misconduct for the same incident. Each complainant was found guilty by an adjustment committee (Committee) of possession of drugs, refusing to obey an order of any staff member, and violating a condition of any community release or furlough program.

We reviewed the staff investigation report. According to the report, an adult corrections officer (ACO) entered the facility kitchen and found the two inmates looking at a clear plastic bag which appeared to contain marijuana. When the inmates saw the ACO, the inmate holding the bag passed the bag to the other inmate. The ACO reported that he told the inmate to give him the bag and the inmate reluctantly complied. The inmates claimed that they found the bag on the floor just before the ACO arrived. A urine sample was obtained from each inmate and the urinalysis on each sample was negative.

We found the Committee's guilty finding of each inmate for possession of drugs to be reasonable. However, the charge of refusing to obey an order and of violating a condition of any community release or furlough program appeared to be duplicative, since both charges were based on the same conduct, which was each inmate's violation of the work furlough agreement that they signed upon admission to the program. We believed that the charge of violating a condition of any community release or furlough program was the more appropriate, as it specifically applied to the inmates' violation of the work furlough agreement.

We informed the Committee chairperson of our concerns and asked for an explanation of the guilty finding on the charges of refusing to obey an order and violating a condition of any community release or furlough program. According to the chairperson, each inmate signed and was expected to comply with the work furlough agreement, which specifies what the inmate can and cannot do. According to the agreement, each inmate understood and agreed that the use, possession, making, buying, or selling of narcotic drugs, dangerous drugs, or marijuana is prohibited. The chairperson informed us that the staff reviews the contract with the inmate before the inmate signs it. Thereafter, if the inmate violates the contract, they are also charged with refusing to obey an order.

The chairperson agreed to speak to the two other Committee members about our concern. Subsequently, the chairperson informed us that the Committee members stood by their decision that the charge of refusing to obey an order was a valid and separate charge for each inmate.

We thereafter contacted the facility warden. We explained our analysis to the warden and requested that he conduct an administrative review. Upon completion of his review, the warden informed us that the charge of refusing to obey an order would stand because on admittance to the facility, each inmate had signed an acknowledgment of the facility's policies and therefore understood that they were prohibited from possessing contraband and were required to abide by the rules, regulations, and policies of the facility.

As we were not persuaded by the explanations from the chairperson and the warden, we requested that the Department of Public Safety director conduct a review of what we believed to be duplicative charges against the two inmates. Shortly thereafter, we received a letter from the institutions division administrator (IDA) on behalf of the director, informing us that he concurred that the charge of refusing to obey an order was duplicative and that the charge would be expunged from the record of each inmate.

We informed each complainant of the outcome of our investigation. A few months later, one of the complainants informed us that he learned the charge had not been expunged from his records. We inquired with the facility records office and were informed that the charge was expunged on instruction from the IDA. We informed the complainant that he had been misinformed and that the charge was expunged.

(09-03083) Inmate was not afforded an adverse reclassification hearing. An inmate complained that he was reclassified from minimum custody to medium custody after he was found guilty of rule violations and transferred to another facility. He contended that he should have retained minimum custody despite his rule violations because his numerical score on a Reclassification Instrument was in the minimum custody range. Although he was transferred to a more secure facility, he did not dispute the transfer.

We reviewed several Department of Public Safety (PSD) policies concerning inmate classification and reclassification.

According to PSD policy, an inmate is initially classified shortly after sentencing and is assigned a custody level based on his or her numerical score on an Initial Classification Instrument. The numerical score is based on an evaluation of various factors in the inmate's past, such as the severity of current and past offenses, history of escape, assaultive behavior, and substance abuse. The inmate is placed in one of five custody levels: maximum, close, medium, minimum, or community. The custody designation determines the security, programming, and degree of staff supervision initially required by the inmate. Thereafter, the inmate is periodically reclassified. As with the Initial Classification Instrument, the numerical score on the Reclassification Instrument is based on an evaluation of various factors, but with greater emphasis on the inmate's conduct in the facility. Factors such as severity of violence, frequency of rule violations, and substance abuse within the facility are scored. The inmate's custody level may then be increased or decreased.

In order to accommodate situations in which the custody level recommended by the Reclassification Instrument numerical score is deemed inappropriate, PSD policy establishes an exception case procedure by which the recommended custody level may be overridden upon approval by the

PSD classification office (CO). The exception case procedure may be used to increase or decrease an inmate's recommended custody level, so may result in action that is unfavorable or favorable to the inmate. By policy, the PSD requires that an inmate be afforded an adverse custody hearing in exception cases that result in an unfavorable action, which includes transfer to a more secure facility.

We reviewed the complainant's Reclassification Instrument and found that his numerical score resulted in a recommended custody level of community, but he was assigned medium custody through the exception case procedure and was transferred to a more secure facility. However, we found no documentation that the complainant was afforded an adverse custody hearing. Upon inquiry, we learned that no hearing was held and, in fact, the facility's practice was to not hold adverse custody hearings in exception cases that resulted in an inmate's transfer to a more secure facility.

We inquired with the CO, which had approved the complainant's medium custody and transfer through the exception case procedure. The CO reported that it is not informed by a facility as to whether an adverse custody hearing is held, but that it conducts training for all facilities in which staff is instructed to conduct such hearings. However, the CO agreed that henceforth it would carefully monitor adverse action and transfer recommendations made through the exception case procedure by this particular facility.

We also obtained written assurance from the facility in question that it would conduct adverse action hearings in all exception case transfers in the future prior to seeking approval of the CO. The facility also agreed to hold an after-the-fact adverse custody hearing with the complainant.

(09-03490) Inmate held beyond release date. In order to ease overcrowding in Hawaii correctional facilities, the Department of Public Safety (PSD) has contracted with operators of private correctional facilities on the mainland to hold Hawaii inmates.

On April 13, 2009, the mother of a Hawaii inmate at a correctional facility in Arizona informed our office that her son was being held beyond his release date. She stated that her son's two sentences were to be served concurrently, but authorities erroneously informed her son that his sentences were being served consecutively.

We contacted the inmate, who stated that he received a letter from the PSD dated January 15, 2009, informing him that his release date was erroneous because sentences he received in 1995 and 1999 had been thought to run concurrently rather than consecutively. The letter informed him that pursuant to Section 706-668.5, Hawaii Revised Statutes, "[m]ultiple

terms of imprisonment imposed at different times run consecutively unless the court orders that the terms run concurrently." (The law has since been amended so that multiple terms run concurrently unless the court orders that they run consecutively). He was informed that according to the law, his sentences were running consecutively and his release date would be in 2013 rather than in 2009.

The complainant informed us that at the time he was sentenced in 1999, the Office of the Public Defender (PD) was to have filed a motion so that his 1999 sentence would run concurrently with his 1995 sentence. He assumed that the motion was filed and was granted, and that his sentences were running concurrently. However, after receiving the January 15, 2009 letter from the PSD, he contacted the PD and learned that the motion was *not* filed in 1999, so his sentences were in fact running consecutively. Thereafter, the PD filed a motion to have his sentences run concurrently. The court granted the motion and issued an order on March 20, 2009 that the complainant be released as his sentences, served concurrently, had expired. However, the PSD had not brought him back to Hawaii to be released.

On April 14 and 17, 2009, we contacted the PSD mainland branch and the PSD offender management program office (OMPO). We found that neither office was aware that on March 20, 2009 the court had amended the complainant's sentence and ordered his release. The OMPO informed us that it would contact the court and if the information from the complainant was verified, he would be brought back to Hawaii on the earliest possible flight to be released.

After verifying the amended sentencing order, the OMPO made special air travel arrangements and the complainant was returned to Hawaii on April 20, 2009 and was released.

DEPARTMENT OF TRANSPORTATION

(09-03859) Motorcycle parking for employees at the airport. An employee of the U.S. Transportation Security Administration who had been parking his motorcycle for free at a covered parking structure at the Honolulu International Airport complained that the Department of Transportation (DOT) had begun to assess employees a monthly fee to park their motorcycles. The complainant questioned why motorcyclists were being assessed a parking fee at the airport because he believed they are not assessed to park at other State parking lots. He also stated that employees were being assessed a $50 monthly fee and required to park their motorcycles in the parking structure. He noted that employees who drove cars or trucks to work

had the option of parking their vehicles in an uncovered lot designated for employees for a monthly fee of $30. However, the motorcyclists were not allowed to utilize the same employee parking lot because there were no spaces designated for motorcycles. The complainant felt it was unfair for motorcyclists to not have the option of parking in the less expensive lot.

In our contact with DOT airports division staff, we learned that airport operations are funded by revenues generated by the airports and almost half of the revenues are attributed to various parking fees. The airports do not receive taxpayer funds. The division decided to impose the parking fee on motorcycles because of a decrease in revenue due to the poor economy. Additionally, division staff informed us that it did not seem fair to impose a parking fee on employees who drove cars and trucks to work while employees who rode motorcycles were able to park for free.

Since the division did not want the parked motorcycles to be scattered throughout the airport, it designated areas in the covered parking structures for the employees to park their motorcycles. The employee parking lot was not covered and was farther from the airport than the covered parking structures. In that sense, the parking for the motorcyclists might be deemed preferable as the parking structures were covered and closer to the place of employment. The division had no plans to make any changes to the arrangement.

We reviewed Title 3, Chapter 30, Hawaii Administrative Rules (HAR), titled "Rules Governing Parking on State Lands." According to the rules, the Department of Accounting and General Services (DAGS), which maintains parking lots for State employees, assesses a monthly parking fee to employees who park their motorcycles on State land under DAGS jurisdiction. Thus, the complainant's belief that employees are allowed to park motorcycles in other State parking lots for free was incorrect.

We also reviewed Title 19, Chapter 15.1, HAR, titled "Operation of Motor Vehicles at Public Airports." According to the rules, the DOT has the authority to prescribe the employee-motorcyclist parking fees. We noted, however, that employees who rode motorcycles had no choice but to incur the $50 monthly fee to park their motorcycles in the covered parking structures, and it seemed unfair that the employees were not afforded the option of paying only $30 a month to park in the employee parking lot.

The division agreed to reconsider the matter and thereafter decided to offer parking for motorcycles in any stall in the employee parking lot for $30 a month on a first-come, first-served basis.

The division informed us that it would notify employees of this offer. We confirmed with the grateful complainant that he received the notice.

UNIVERSITY OF HAWAII

(09-02427) Contradictory information on a library sign. A man complained on January 18, 2009 that a sign posted at the entrance to a library on a University of Hawaii (UH) campus contained conflicting information as to when the public could use the library. A change in the library's hours scheduled to take effect on February 1, 2009 added to the confusion.

On January 26, 2009, library staff informed us that the library was open 24 hours a day, 7 days a week. However, use of the library between 11 p.m. and 7:30 a.m. each day was restricted to UH faculty, students, and staff with proper UH identification (ID). During these hours, persons without the proper UH ID were not allowed to enter the library or were asked to leave. Effective February 1, 2009, the restricted hours would begin earlier, from 9 p.m., and last until 7:30 a.m. According to library staff, the reason for the change was a noticeable increase in the number of library users from 9 p.m. Many library users without UH ID occupied the library computers throughout the night, and it appeared that some homeless persons were taking shelter at the library overnight. Library staff reasoned that persons who paid tuition should be allowed use of these resources during these hours. Budget constraints and security concerns also prompted implementation of the new restricted hours.

On January 28, 2009, we visited the library and viewed the sign in question. One part of the sign read "UH ID required for entrance from midnight until 7:30 a.m." Another part of the sign read, in red letters, "Building access limited to UH Faculty, Students, and Staff with valid UH IDs from 9:00 p.m. to 7:30 a.m. beginning February 1, 2009."

We contacted library staff on January 29, 2009 and pointed out that "UH ID required for entrance from midnight until 7:30 a.m." conflicted with the reported practice of restricting library use from 11 p.m. The staff agreed and informed us that the sign would be corrected.

We made another visit to the library on February 4, 2009, by which time the new restricted hours were in effect. We found that the sign had been redone but still contained the statement "UH ID required for entrance from midnight until 7:30 a.m.," as well as the statement "Building access limited to UH Faculty, Students, and Staff with valid UH IDs from 9:00 p.m. to 7:30 a.m. beginning February 1, 2009." Since it was after February 1, 2009, the statements on the sign were in conflict as to the beginning time of the restricted hours. We reported the conflict to the library staff, who verified the conflicting information and assured us that the sign would be revised.

On February 9, 2009, we again visited the library. We found that the sign was corrected to reflect the correct 9 p.m. beginning time of the restricted use hours.

We informed the complainant of the corrective action taken by the library staff.

CITY AND COUNTY OF HONOLULU

(09-02201) Lack of traffic warning sign. After returning to his home State, a tourist emailed a complaint about the lack of a sign warning of a stop sign ahead on the approach to a "T intersection" in Waikiki. He reported that a driver's view of the stop sign was obstructed by a temporary barrier and roof over the sidewalk that was erected to protect pedestrians from falling materials from an adjacent construction site. He complained that because of the lack of a warning sign, he did not see the stop sign and he was cited by a police officer for failing to stop.

The complainant stated that he was driving in the right lane of Kalia Road approaching the Saratoga Road intersection. Traffic in the right lane of Kalia Road must turn right onto Saratoga Road, while traffic in the left lane must continue on Kalia Road, and there were stop signs at the intersection requiring each lane of traffic to stop. The complainant alleged that there was no sign to warn drivers who intended to turn right onto Saratoga Road that there was a stop sign ahead, but the police officer who cited him claimed that there was a warning sign. The complainant acknowledged that there was a warning sign on Kalia Road but he believed that because the arrow on the sign pointed straight ahead, the sign was to warn drivers who intended to continue on Kalia Road rather than drivers who intended to turn right onto Saratoga Road. He contended that there should also be a warning sign with an arrow that pointed to the right.

The complainant was also unhappy that the court ruled against him when he contested the traffic citation. We informed him that our office was unable to assist him with regard to the court's disposition of his citation, as by law we do not have jurisdiction over the actions of a court.

We decided to conduct an on-site inspection of the intersection to form our own opinion as to whether corrective action by traffic officials was necessary to alleviate a problem. We confirmed that due to the barrier and protective sidewalk roof, motorists on Kalia Road driving toward the intersection did not have an unobstructed view of either of the two stop signs, which required traffic in each lane to stop at the intersection. We

Kalia Road (left) and Saratoga Road (right arrow) approaching the intersection

Intersection at Kalia Road and Saratoga Road with warning sign at construction site

identified the warning sign, which was a yellow diamond-shaped sign with a red octagonal shape representing a stop sign and a black arrow pointing upward.

In order to assess the complainant's suggestion of a warning sign with an arrow pointing to the right, we reviewed the U.S. Department of Transportation Manual on Uniform Traffic Control Devices (Manual), 2003 Edition. The Manual is published by the Federal Highway Administration and defines the standards used by road managers nationwide to install and maintain traffic control devices on all streets and highways. Section 2C.29 of the Manual, titled "Advance Traffic Control Signs," states:

> The Advance Traffic Control symbol signs . . . include the Stop Ahead (W3-1), . . .These signs shall be installed on an approach to a primary traffic control device that is not visible for a sufficient distance to permit the road user to respond to the device . . . .

We found that the Manual depicts various standardized traffic control signs. The Manual identifies the warning sign on Kalia Road as a Stop Ahead, or W3-1 sign, but does not describe any advance traffic control sign that displays a stop sign symbol with an arrow pointing to the right or left.

We concluded that the arrow on the Stop Ahead W3-1 sign adequately warned drivers that there was a stop sign ahead, without regard to whether they intended to turn right or continue straight ahead.

We informed the complainant that based on our investigation and findings, we were unable to recommend the installation of the type of sign he suggested.

COUNTY OF HAWAII

(09-03726) Confidentiality of building code violation. A man complained that the building division (Division) of the Department of Public Works had not taken any action against a neighbor whose wooden structure was built without the proper permits and whose tents were illegal. Based on our inquiry, a Division inspector made a site visit and subsequently issued to the neighbor a Notice of Violation for the illegal structures and a Notice of Order requiring the neighbor to pay a $100 fine and an additional $100 daily fine if corrections were not made by a given deadline. The neighbor was informed that the order would be final unless she appealed to the building board of appeals. Additionally, if she failed to comply with the order, the

case may be referred to the Office of the Corporation Counsel for civil remedy or to the Prosecuting Attorney's Office for criminal prosecution.

As part of our investigation, we requested and received from the Division a copy of the Notice of Violation and the Notice of Order. The building inspector warned us that information in the notices was confidential and could not be shared with the complainant.

We were aware, however, that other counties treated notices of building violations and orders for correction as public documents. We reviewed Opinion Letter No. 90-36 of the Office of Information Practices (OIP), the State agency that administers Chapter 92F, Hawaii Revised Statutes, titled "Uniform Information Practices Act," which is Hawaii's open records law. The OIP opinion, dated December 17, 1990, was that notices of violations of zoning, housing, building, electrical, or plumbing codes are public records that must be available for public inspection and copying.

We contacted the Division administrator. He informed us that the information in a notice is made public after a case is resolved. However, while the case is pending, information in the notices is confidential. We advised him of the OIP opinion and he informed us that he would consult the Division's legal counsel.

Subsequently, the Division administrator informed us that the Office of the Corporation Counsel advised him that the Notice of Violation and Notice of Order were public records once the notices were issued to the property owner. The Division administrator informed us that the building inspectors would be apprised to treat the notices accordingly.

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Appendix

CUMULATIVE INDEX OF SELECTED CASE SUMMARIES

To view a cumulative index of all selected case summaries that appeared in our Annual Report Nos. 1 through 40, please visit our website at www.ombudsman.hawaii.gov and select the “Annual Reports” link from the homepage.

If you do not have access to our cumulative index via the Internet, you may contact our office to request a copy.

Office of the Ombudsman 2008-2009

Report No. 40

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