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LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII

List No. 30--Opinion
Nos. 85-1 to 86-18

Opinion No.
Date Issued

Digest

85-1
(Jan. 25)
1985

Compensation of the UH President--Fringe Benefits. Since the legislature did not expressly address the fringe benefit component of the Board of Regents compensation package for the Board's candidate for the office of UH President in 1984, and because the fringe benefit component represents a significant departure from the pattern of compensation established by the legislature for public employees generally, the legality or illegality of the fringe benefit component cannot be established clearly or convincingly.

The term "salary" as used in section 26-52, HRS, does not mean "compensation" and while fringe benefits constitute "compensation," they are not "salary" within the meaning of and for purposes of section 26-52, HRS.

85-2
(Feb. 4)

Fair Notice of Meeting Agenda Required--Copies of Meeting Minutes Required. All matters to be considered under general categories such as "Unfinished Business" and "New Business" must be listed on the agendas and made a part of the written public notice of the Commission meeting, in order to give interested members of the public reasonably fair notice of what the Commission proposes to consider.

Section 92-9(b), HRS, specifies that the Commission has the responsibility to provide its meeting minutes to members of the public on request.

85-3
(Feb. 28)

Adult Education--Alternative Program for Secondary Schools. The adult education program provided under section 301-2(3), HRS, can be considered as an "alternative educational program" under the compulsory school attendance provision of section 298-9, HRS.

85-4
(Mar. 21)
1985

Retroactive Compensation for Reallocated Positions. The effective date of a reallocation action determines whether a retroactive pay adjustment must be made. Section 76-13(8)(C), HRS, grants discretion to the state personnel director to determine different effective dates for reallocation actions by rule. Sections 76-78 and 76-80, HRS, and the charter of the City and County of Honolulu make section 76-13, HRS, or provisions similar thereto applicable to the counties of Hawaii, Maui, Kauai, and the City and County of

Honolulu and also vest in the personnel directors of those counties the same discretion to determine the effective date of the reallocation action. The perceived difference between the practices of the State and the County of Hawaii, therefore, is not contrary to the uniformity requirement of section 77-10, HRS.

85-5
(Apr. 10)
1985

Compensation Adjustments for Less Than All Excluded Officers in the Excluded Managerial Compensation Plan. The Conference of Personnel Directors is statutorily authorized to adjust the compensation of excluded managerial *police officer's pay without providing similar pay adjustments for officers and employees whose positions have been designated managerial and excluded from coverage under the collective bargaining law pursuant to section 77-13.1(a), HRS. Any action the Conference may take pursuant to this authority need only be reasonably based and uniformly implemented within a same class.

85-6
(Apr. 12)
1985

Condominium Association Common Element Area Votes and Bylaw Amendments. The provision against the casting of votes allocated to common element areas, added to section 514A-82(2), HRS, by Act 112, SLH 1984, does not have retrospective effect.

If the existing bylaws of a condominium association require the consensus of a percentage of apartment owners greater than sixty-five per cent, that percentage of votes or written consents is required to amend the bylaws from more than sixty-five per cent to sixty-five per cent.

85-7
(May 29)
1985

County Charter Amendment for Nonpartisan Election of Prosecutor. The legislative body of a county can propose a charter amendment for ratification by the electorate which, if ratified, would provide for the nonpartisan election of the prosecutor.

85-8
(May 31)
1985

State's Tort and Workers' Compensation Liability When Utilizing Volunteers to Staff Public Libraries. Volunteers are considered to be "employees of the State" for tort liability pursuant to sections 662-1(2) and 662-2, HRS. and for workers' compensation pursuant to section 386-171, HRS.

The utilization of volunteers to staff public libraries may result in liability to third parties for the tortious acts or omissions of the volunteers or to the volunteers for injuries suffered in the performance of volunteer service for the State. However, the extent of the liability of the State will be no greater than it would be if a paid employee were involved in the same circumstances under chapter 662 or 386, HRS.

85-9
(Jun. 17)
1985

Holiday to Celebrate the Birthday of Martin Luther King Jr.
Hawaii residents may celebrate Martin Luther King's birthday as a state holiday in 1986 only (1) if the President issues an independent proclamation declaring it a national holiday, (2) if the Governor independently proclaims the day a state holiday pursuant to section 8-1, HRS, which specifically provides that "[a]ny day designated by proclamation.. . by the governor as a holiday" shall be set apart and established as a state holiday, or (3) the state legislature enacts a specific law designating it a state holiday.

85-10
(Jul. 10)
1985

Average Final Compensation of an Employee Who Held More Than One Position--Retirement Service Credit for Military Service. A member of the Employees' Retirement System must have made contributions to the system in order to have pay or salary for that period of time included as part of the member's average final compensation. The legislature's intent in enacting section 88-42.5, HRS, was to limit the membership of employees to only one full-time position.

Pursuant to section 720, Revised Laws of Hawaii 1945, as amended by Act 262, SLH 1951, to be entitled to retirement service credit during the period of time served in the military, the employee must meet two qualifications: (1) the employee must have entered the military service of the United States on or after June 25, 1950; and (2) the employee must have been an active member of the Employees' Retirement System employed in a position immediately prior to the employee's induction into the military service.

85-11
(Jul. 19)
1985

Abstention from Voting at Board Meetings--Effect When Majority Vote Required. Abstentions are not equivalent to, nor do they constitute, "concurrence" for the purpose of validating board action in conformity with section 92-15, HRS. The words "concurrence of majority" mean nothing less than the affirmative votes of the majority.

85-12
(Jul. 24)
1985

Time of Qualification of an Organization Applying for a Purchase of Service Agreement. Section 42-2, HRS, does not contain ambiguous language as to when an organization requesting a purchase of service agreement must meet the qualifying standards. It is clear that the qualifying standards must be met at the time of the organization's application to either the appropriate agency, pursuant to section 42-4, HRS, or to the appropriate standing committee of the legislature, pursuant to section 42-5(c), HRS.

85-13
(Jul. 24)
1985

Two-Year Contracts Under Chapter 42, HRS. Neither chapter 42, HRS, nor section 6-3-11(d)(2) of the Hawaii Administrative Rules adopted by Department of Budget and Finance prohibit a department from entering into

agreements with recipients and providers under chapter 42, HRS, covering a two-year period.

85-14
(Jul. 26)
1985

Trustees of the Travel Agency Recovery Fund--Sunshine Law Applicability. Trustees of the Travel Agency Recovery Fund are subject to the provisions of part I of chapter 92, HRS, popularly referred to as the "Sunshine Law." Section 26-35.5(b), HRS, relating to civil liability, is applicable to the trustees of the fund.

85-15
(Aug. 2)
1985

Deposit of Administrative Rules With the State Publications Distribution Center. Administrative rules of agencies, adopted pursuant to the Hawaii Administrative Procedure Act, chapter 91, HRS, are required to be submitted to the State Publications Distribution Center under section 93-1, HRS.

85-16
(Aug. 9)
1985

Development Tract--Computation Under Chapter 516, HRS. A development tract is a collection of residential lots, and if the lots are not residential in nature, they should not be considered part of the development tract. Nonresidential properties such as commercial properties, parks, roadways, and similar areas should not be considered when calculating the total area of a particular development tract. Fee simple lots do not fit the definition of residential lots under chapter 516, HRS, as that chapter applies to land leased as residential lots. Lots which exceed 2 acres in size are not residential lots as defined in section 516-1(11), HRS.

85-17
(Aug. 27)
1985

General Fund Expenditure Ceiling--Application to All Branches of State Government. The "process" specified by section 37-93(b), HRS, and mandated by section 9 of Article VII of the Hawaii Constitution is applicable only to the overall "General Fund Expenditure Ceiling" on the aggregate appropriations for the executive, judicial, and legislative branches of the state government. There is no constitutional provision mandating individual "expenditure ceilings" for the judicial and executive branches of government.

85-18
(Sep. 6)
1985

Applicability of State Sunshine Law to the ASUH Senate. The operations of the Senate of the Associated Students of the University of Hawaii (ASUH) are not subject to the state "Sunshine Law," part I of chapter 92, HRS.

85-19
(Sep. 10)
1985

Use of Advance Deposits for Arbitration Proceedings Under Chapter 519, HRS. The Hawaii Housing Authority may not use the advance deposits referred to in sections 519-2(b)(1) and 519-3(b)(1), HRS, to pay for such things as the cost of its administrative processing of applications for arbitration pursuant to chapter 519, HRS.

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85-20
(Sep. 16)
1985

Publication of Unclaimed Property Notices--Statewide Circulation. The "Notice of Names of Persons Appearing to be Owners of Abandoned Property," required under section 523A-18(a), HRS, can be placed for publication in The Honolulu Advertiser, a newspaper of general circulation in the State and not necessarily in the newspaper printed and primarily circulated within each county.

85-21
(Sep. 18)
1985

Eligibility of a Retirant Who Returned to Service Before June 30, 1984, for Membership in the Noncontributory Plan. A retirant who initially retired as a member of the contributory plan and subsequently returned to service as a member of a contributory plan (class A member) can by timely declaration under section 88-271 (a), HRS, become a class C member or noncontributory plan member pursuant to section 88-47(3) (C), HRS, simply by making the election allowed under section 88-271(a), HRS.

When such a returned retirant, as a member of the noncontributory plan, retires again, pursuant to section 88-273(c), the member is entitled to receive the contributory plan benefits to which entitled when the member initially retired plus those to which the member is entitled as a class C member for the period of reemployment.

85-22
(Oct. 15)
1985

Disposition of Interest Earned on Special Funds. Section 38-9, HRS, which provides that interest earned from the deposit of special funds in qualified depositories is credited to the respective special fund, takes precedence over section 36-21, HRS, which provides that all interest earned on money invested by the Director of Finance is credited to the general fund. Interest earned on the short-term investment of special fund moneys by means other than deposits under section 38-2, HRS, must be credited to the general fund.

85-23
(Oct. 17)
1985

Public Disclosure of Information Contained in Commercial Marine Licenses. Because personal information subject to section 92E-4(2), HRS, is recorded on commercial marine licenses, the Department of Land and Natural Resources may not allow the licenses to be inspected by the public. However, a roster containing certain limited information relating to commercial marine licenses may be publicly disclosed under section 92E-4(2), HRS.

85-24
(Oct. 23)
1985

Bylaws or Policies Relating to Nepotism and Conflict of Interest Situations Under Chapter 42, HRS. The national association of Alzheimer's Disease and Related Disorders bylaw concerning compensation and conflicts of interest does not fully satisfy the requirements of section 42-2(3), HRS, in that it does not include a statement of policy relating to nepotism. The Alzheimer's Disease and Related Disorders

Association, Honolulu Chapter, Inc., does not satisfy the qualifying standards for organizations with which the Executive Office on Aging may enter into purchase of service agreements.

85-25
(Nov. 15)
1985

Licensing of Church-Sponsored Day Care Programs.
Licensing of church-sponsored day care programs does not violate the First Amendment of the United States Constitution.

Religious organizations whose programs do not provide exclusively for "specialized training" as defined by section 346-152(4), HRS, and which fall within the statutory definition of child "care" must have a license from the Department of Social Services and Housing.

85-26
(Nov. 25)
1985

University of Hawaii Investment Policy--Prudent Man Rule.
Trustees in the State of Hawaii are governed by the "prudent man" standard of care in making decisions on University investment policy set forth in section 560:7-302, HRS, unless the words creating the trust provide otherwise. Absent legislative change, the Board of Regents is governed by the "prudent man" rule with respect to its investment responsibilities.

The application of the "prudent man" standard does not preclude the Board from adopting a policy which could lead to the divestiture of certain investments based on what is viewed as unacceptable corporate policies and practices that cause substantial social injury. Consideration of social and moral factors must be subordinate to and not sacrifice the safety of the trust corpus and the production of an adequate return on investments.

85-27
(Nov. 27)
1985

Applicability of the Hawaii Sunshine Law to the Committees of the University of Hawaii Board of Regents. The role of the standing and select committees of the Board of Regents is of such significance in the conduct of the Board's business that the meetings of the committees must be conducted in accordance with the Hawaii Sunshine Law, chapter 92, part 1, HRS.

85-28
(Nov. 22)
1985

Appropriation for Design--Use of for Acquisition. In the form that item G-121 of Act 300, SLH 1985, appropriation presently exists for design purposes, the Department of Accounting and General Services may not initiate action to acquire existing apartment buildings or subjacent land.

85-29
(Dec. 17)
1985

Applicability of Chapter 92E, HRS, to Personal Information About Individuals Other Than the Complainant Supplied in Response to Request/Subpoena. The complainant has no right, under section 92E-4, HRS, to see the records

maintained by an agency even upon their transmittal in an employment practice case. A disclosure by the Department of Labor and Industrial Relations of such personal information to the complainant not otherwise duly authorized or ordered would be a violation of section 92E-4, HRS.

85-30
(Dec. 20)
1985

Requirement of an Environmental Assessment for Proposed Amendments to Development Plans of the City and County of Honolulu. Chapter 343, HRS, is applicable to noncounty initiated actions which propose amendment or change to a county's planning documents, however denominated as development plans or otherwise, and which would result in a land use designation other than agriculture, conservation, or preservation.

86-1
(Jan. 7)
1986

State Regulation of Helicopter Flights. The State may not enact any legislation that has the effect of restricting helicopter flight altitudes or routes.

86-2
(Jan. 22)
1986

Required Service-Connected Total Disability Retirement--Membership in System. Chapter 88, HRS, "Pension and Retirement Systems," does not allow the Board of Trustees of the Employees' Retirement System the discretion to accept an application for service-connected total disability retirement benefits or any other retirement benefits after the applicant voluntarily elected to terminate membership in the System. An applicant must be a member of the System at the time the initial disability application is made.

86-3
(Feb. 4)
1986

City and County Zoning and Planning Requirements--Application to State Properties and Projects. State properties and public projects are immune from the counties' zoning and planning laws. Therefore, a private nonprofit lessee of state property undertaking a park project in the public interest also enjoys immunity from county regulation. The lessee, however, must comply with the City and County Development Plan if the lease provision requires compliance with all applicable municipal laws.

86-4
(Feb. 6)
1986

Resignation from Public _____ to Seeker of Federal Office. A state or county elected official, who seeks a federal elective office with a term which begins prior to the end of the state or county office's term, is required under Article VII section 7, Hawaii Constitution, to resign from the state or county office as soon as the official has filed nomination papers for the federal office.

Public officer must resign from the state or county office held no later than when nomination papers for the federal office are filed under section 12-6,

86-5
(Feb. 10)
1986

Applicability of the State Sunshine Law to the County Councils--Opportunity to Present Testimony. A county council may not delegate the responsibility of hearing oral testimony or receiving written testimony on items to its committees and thereby preclude interested persons from testifying on those items at meetings of the county council when the items are on the agenda.

An opportunity to testify on an item must be afforded at every meeting of the board held to consider the item, even if a public hearing on the item has been held.

86-6
(Feb. 24)
1986

State Responsibility for Medical Expenses of Volunteer Personnel. Section 386-171, HRS, disallows coverage for hospital and medical expenses when a volunteer has secured the payment of the volunteer's medical expenses from another entity. When a volunteer's alternative source of medical coverage does not cover the total expenses incurred, the State or a county is responsible for the uncovered portion of reasonable medical and hospital expenses.

86-7
(Mar. 4)
1986

Naturopathy--Surgery--Prescription of Drugs. Naturopaths are not permitted to perform surgery under current statutes, and the addition of "minor surgery" to the acts which naturopaths may lawfully perform would enlarge upon the scope of their practice. The law under which naturopaths are licensed does not authorize them to use drugs in their practice; moreover, no other law entitles them to prescribe prescription drugs, including controlled substances.

86-8
(Mar. 6)
1986

Budget Proviso--Not Within Title of Bill. Section 164 of Act 300, SLH 1985, requiring the Corrections Division, Department of Social Services and Housing, to limit the prisoner population at the Waiawa Correctional Facility is not within the title of Act 300 "Relating to the State Budget" and is unconstitutional. Further, it is in contravention of section 353-3, HRS, vesting full powers in the Director of Social Services to determine the appropriate housing of the state inmate population, is therefore an attempt to establish general legislation on a matter not covered by the title of Act 300, and is not germane to the title or subject matter of Act 300.

86-9
(Mar. 10)
1986

Private Attorneys Retained by the Trustees of the Travel Agency Recovery Fund and the Contractors Recovery Fund--Applicability of Attorney General Approval Requirement. Section 103-3, HRS, requiring the approval of the attorney general before public funds may be used to compensate private attorneys is inapplicable to the contracts retaining private legal counsel to represent the trustees of the Travel Agency Recovery Fund and the Contractors License Board in actions which may result in collection from the Travel Agency

Recovery Fund or from the Contractors Recovery Fund. Sections 444-29 and 468K-6, HRS, respectively, expressly authorize the trustees or the board to retain private legal counsel for actions which may result in collection from the funds.

86-10
(Mar. 21)
1986

Residency Qualifications of Members of the Legislature--
Temporary Residence Absence from District. Section 11-13(1), HRS, permits a person who must be absent from the place regarded as the person's residence to maintain resident status during that person's absence. A person can continue to serve as a state representative from the district which elected the representative and run for re-election from that district under such circumstances.

86-11
(Mar. 31)
1986

Permissibility of an "Owner Controlled Insurance Program" Workers Compensation Policy. Section 386-124, HRS, does not permit the sale of an "Owner Controlled Insurance Program" policy when every such policy does not cover the entire liability of the employer to the employer's employees. The Hawaii statute does not contain an express provision which would allow a division of coverage among insurance carriers through an agency's approval.

86-12
(Apr. 10)
1986

Effective Date of Bill Passed by the Legislature Without an Approval Date. There is no constitutional or statutory provision requiring the legislature to include within any bill the date that the bill is to take effect. Thus, the absence of such a provision does not automatically render the bill invalid.

A lawfully passed bill, when silent as to its effective date, will become law when signed by the Governor or after expiration of the appropriate number of days after presentation as provided by the Hawaii Constitution.

86-13
(Apr. 22)
1986

Hawaii Housing Authority Housing Developments Subject to Environmental Review Process. Section 359G-4.1 (a), HRS, does not exempt housing developments of the Hawaii Housing Authority from compliance with chapter 343, HRS. Such housing developments are subject to the environmental review process set forth in chapter 343, HRS, and to the administrative rules adopted pursuant to that chapter.

86-14
(May 12)
1986

Personal Information on Apprentices--Not Releaseable to the Federal Bureau of Apprenticeship and _____ Section _____ HRS, does not provide authority for the Apprenticeship Division to disclose information pertaining to Hawaii apprentices to the Federal Bureau of Apprenticeship and Training, even though the data from Hawaii would only

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be reflected in national statistical data and purged of individual identification criteria.

86-15
(Jun. 10)
1986

Maintenance of Certain Public Streets and Highways--Responsibility of Counties. The maintenance of public highways not under the jurisdiction of the state Department of Transportation is the responsibility of the counties, pursuant to sections 264-2 and 265A-1, HRS.

86-16
(Jun. 19)
1986

Financial Statements Filed Pursuant to Hawaii Environmental Disclosure Law--Not Confidential. Financial statements filed with the Office of Environmental Quality Control pursuant to section 343D-3(I)(B), HRS, are not to be afforded confidential treatment under section 92-50, HRS. All materials filed with the Office of Environmental Quality Control as part of disclosure statements pursuant to chapter 343D, HRS, are to be made available to the public.

86-17
(Jul. 11)
1986

Resignation from Public Office--Applicability When Term Begins Before Expiration of Present Term--Successor Elected at Same Election. Section 7, Article II of the Hawaii Constitution was never intended to apply to officeholders running for office whose term begins before their present term in office expires, where their successors would be elected at the same election in which they are candidates for such other office.

86-18
(Aug. 7)
1986

Use of Social Security Numbers by Public Libraries--When Lawful. Public libraries may not demand social security numbers from library patrons who wish to borrow books from the public libraries or the University of Hawaii through the public libraries.

Public libraries may ask for the patron's social security number as part of the information requested when registering library patrons in the public libraries' automated circulation system, if the library patron is informed that the disclosure of such social security number is not mandatory and not a prerequisite for borrowing books through the library system, and if the patron is told of the uses to be made of the social security number.

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LEGISLATIVE REFERENCE BUREAU
August 22, 1986

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STATE OF HAWAII

LISTING OF OPINIONS
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STATE OF HAWAII

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1986-

List No. 31--Opinion
Nos. 86-19 to 87-6

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86-19
(Sep. 2)
1986

Office of Hawaiian Affairs (OHA) Trustees--Private *Retreat--Sunshine Law. Part I, chapter 92, Hawaii Revised Statutes, known as the Hawaii *Sunshine Law" is applicable to a private "retreat" of Office of Hawaiian Affairs (OHA) trustees because a "retreat" is equivalent to a "meeting" as defined in section 92-2(3). A "retreat" is therefore subject to the open meetings requirement of the Sunshine Law and the topics to be discussed during the "retreat" generally do not meet the exceptions to the open meetings requirement.

86-20
(Oct. 22)
1986

Retirant Under the Contributory Plan Who Returns to Service After June 30, 1984 Must Be a Class C Member, a Member of the Noncontributory Plan. While not clearly evident in the legislative history of sections 88-47, 88-96, 88-97, 88-271, "vested membership status" as defined in section 88-96(b) does not apply to "retirants," who are no longer "members," of the retirement system. Thus, returning retirants must be considered to be employees "without vested benefit status" for the purposes of determining election into the retirement system under section 88-271.

If the returning retirant is in a position covered by Title II of the Social Security Act, pursuant to section 88-47(3)(B), the retirant must be a member of the noncontributory plan and a class C member of the retirement system. Even if the returning retirant is not in a position covered by Title II of the Social Security Act, the retirant must be a member of the noncontributory plan pursuant to section 88-271 (b).

86-21
(Nov. 26)
1986

Newly Elected Members of the Board of Education May Not Officially Assume the Duties of Office Until They Take the Required Oath of Office and are Issued Certificates of Election. Sections 11-155 and 11-156, Hawaii Revised Statutes, provide that an election is not complete until the election results are certified. Furthermore, Article XVI, section 4, of the Hawaii State Constitution provides that all public officers are required to take and subscribe to an oath of office before assuming duties of their office.

However, members of the Board of Education whose-terms of office ended on election day November 4, 1986, are de facto officers and may hold a meeting scheduled for November 13,

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1986, and may vote and conduct business on the agenda, and such members are entitled to receive the regular per diem and compensation for such meeting.

86-22
(Dec. 1)
1986
(rev. of
opinion
dated
Nov. 26,
1986)

Prepaid Legal Service Plan--Subject to When Membership is Open to the Public. Chapter 488, Hawaii Revised Statutes, is applicable to a prepaid legal service plan whose membership is open to the public. The legislative intent behind chapter 488, Hawaii Revised Statutes, was to subject prepaid legal service plans to consumer protective legislation. A plan whose membership is open to the public, solicited by a promoter of a plan, is no different from a group of consumers who form a group and open membership to the group to other consumers.

87-1
(Mar. 3)
1987

Counties--Proposed Repeal of Special and Local Laws Not Violated by Replacement with Grants of General Powers of Uniform Application. Article VIII, section 1, of the Hawaii Constitution which provides that powers of political subdivisions be conferred under general laws only would not be violated by a proposed bill to repeal special or local laws pertaining to individual counties, where the bill proposes to replace these special laws with grants of general powers which would have uniform operation in all counties of the State.

Special or local laws enacted prior to the constitutional provision requiring that powers of political subdivisions (such as counties) be conferred under general laws only remain in force and effect until repealed. The repeal of special or local laws may be accomplished by the enactment of either a general law or a special law, without contravening Article VIII, section 1.

87-2
(Apr. 20)
1987

Employees' Retirement System--Investment Policy--Divestment. Opinion no. 85-26 relating to divestment by the Board of Regents of the University of Hawaii applies to the Trustees of the Employees' Retirement System. Section 560:7-302, Hawaii Revised Statutes, applies the "prudent man" rule of a trustee's standard of care in dealing with trust assets. Under this rule, made applicable to trustees by sections 406-22 and 554-6, Hawaii Revised Statutes, investment decisions could be premised upon social and moral factors as long as the resulting transaction did not sacrifice the safety of the trust corpus and production of an adequate return on investments.

87-3
(Jun. 15)
1987

Art in State Buildings--One Per Cent for Acquisition of Art Works. Section 103-8, Hawaii Revised Statutes, which provides that one per cent of the appropriations for the original construction of any state building be set aside for the acquisition of works of art is applicable only to that

portion of the capital expenditure appropriation used to construct a state building and is not applicable to the total capital expenditure appropriation containing moneys for the construction of roadways, runways, and taxiways.

The term "building" as used in section 103-8 can only mean structure with walls.

07-4
(Aug. 20)
1987

Employees' Retirement System--Eligibility for Membership of Members of the Board of Education. Delegates to a Constitutional Convention, and Trustees of the Office of Hawaiian Affairs. Under section 88-21, Hawaii Revised Statutes, as amended by Act 165, Session Laws of Hawaii 1982, members of the Board of Education, Delegates to a Constitutional Convention, and Trustees of the Office of Hawaiian Affairs were excluded from membership in the Retirement System by excluding them from the definition of "elective officer."

Termination of membership in the Employees' Retirement System on July 1, 1982, by enactment of Act 165 did not violate either section 2 of Article XVI or the due process clause in section 5 of Article I of the State Constitution. Neither did Act 165 violate the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. Unless the individuals qualify as System members in other capacities, any contributions received from persons affected by Act 165 after June 30, 1982, may be returned and the System's records revised to indicate a service ending date of June 30, 1982.

87-5
(Aug. 17)
1987

Legislators--Scope of Immunity Under Section 7, Article III State Constitution.

- (1) A traffic violation is excluded from the grant of legislative immunity because it is a "breach of peace."
- (2) A parking ticket, does not entail any restraint or detention of the person. Therefore, it does not qualify as "an arrest," given the understanding of the term at the time section 7, Article I, was originally adopted.
- (3) The scope of immunity conferred by section 7, Article III, is narrow and provides for a privilege in situations in which there is an actual physical detention of a legislator en route to, during, or returning from a legislative session. The privilege cannot be invoked for any criminal offenses, no matter how slight the infraction.

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87-6
(Dec. 1)
1987

Surname of Legitimated Child. Where a paternity order issued by the family court after May 27, 1980, is silent on the surname of the legitimated child, the Department of Health should issue, upon request, a new certificate of birth that shows the surname of the child to be the surname that was listed for it on the original birth certificate, unless the parents agree that the surname should be changed.

For children legitimated pursuant to paternity judgments issued prior to May 28, 1980, which did not specify a last name for the child, the Department of Health should prepare a new birth certificate for the child using the mother's last name as the surname for the child, unless the parent who requests the preparation of a new birth certificate asks for a different surname, pursuant to section 338-17.7(a), Hawaii Revised Statutes, as enacted by Act 39, Session Laws of Hawaii 1973, and in force up to May 27, 1980.

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December 4, 1987

LISTING OF OPINIONS
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LEGISLATIVE REFERENCE BUREAU

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List No. 32--Opinion
Nos. 88-1 to 88-8

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88-1
(Mar. 23)
1988

Criminal Injuries--Member of Household--Compensation. For purposes of the Criminal Injuries Compensation law, the exception in section 351-34, Hawaii Revised Statutes, prohibiting recovery by victims who were members of the offender's household, should not apply to the particular victim (who had been paying rent to stay at the offender's house) where there appeared to be no collusion between the victim and the offender, where the relationship was minimal, and where the relationship had ended.

88-2
(Apr. 20)
1988

Criminal Injuries--Psychological or Physical Trauma--Compensation. Criminal Injuries law does not allow awards to someone who suffers psychological or physical trauma in reaction to the death of a crime victim.

88-3
(Aug. 4)
1988

No-fault Insurance Card--Proof of Financial Responsibility. A conviction under section 286-116(a), Hawaii Revised Statutes, for not having a valid no-fault insurance identification card does constitute an offense of failing to have an effective no-fault insurance policy within the meaning of section 287-20(a) (3), Hawaii Revised Statutes, thereby requiring the convicted person to submit proof of financial responsibility.

88-4
(Sep. 8)
1988

Civil Service Commission--Compensation. Members of the Hawaii, Maui, and Kauai County Civil Service Commissions are not entitled to any compensation under section 76-50, Hawaii Revised Statutes.

88-5
(Sep. 15)
1988

"Votes Cast"--Ballots. Blank and spoiled ballots should not be included as "votes cast" in determining whether a candidate in the Honolulu Prosecutor's election received a majority of the votes cast.

88-6
(Oct. 24)
1988

Motor Vehicle License--Application of Minor--Parental Signature of Custody Parent. For the purpose of signing an application of a minor for an instruction permit or driver's license under section 286-112, Hawaii Revised Statutes, which requires both parents to sign if both have custody, "custody" means "legal custody" when a court has awarded legal custody to both parents and physical custody to only one parent.

Opinion No.
Date Issued

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88-7
(Oct. 24)
1988

Neighborhood Board Members--Resign to Run. Section 7, Article II, of the Hawaii State Constitution does not apply to neighborhood board members, because they do not exercise sovereign powers and are therefore not public officers. Thus, members of neighborhood boards are not required to resign their positions before seeking election to a public office.

88-8
(Dec. 1)
1988

Judges--Temporary Assignment of District Court Judge to Circuit Court. A duly appointed district court judge licensed to practice law for less than ten years may be temporarily assigned to preside on the circuit court by the Chief Justice of the Supreme Court of Hawaii, because the State Constitution does not condition the Chief Justice's power to district judges to serve temporarily on the circuit court, and the assignment does not constitute an appointment.

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**LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

LIST NO. 33

**Opinion No.
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89-1
(Feb. 2, 1989)

Disclosures by Applicant and Licensee of Arrests, Convictions, Bankruptcy, and Civil Actions. The boards and commissions are allowed by state law to request information concerning an applicant's conviction of a crime directly related to the profession for which the person seeks to be licensed, and may request information regarding civil complaints, judgments, and arbitration related to the profession. However, boards and commissions are prohibited by state law from using information regarding an applicant's arrest record, and are prohibited by Federal law from using information regarding an applicant's history of bankruptcy.

89-2
(Feb. 9, 1989)

General Fund Expenditure Ceiling; Procedures for Making Appropriations which Exceed. Each act containing appropriations which exceed the general fund expenditure ceiling must state the dollar amount and the rate by which the ceiling will be exceeded; state the reasons for exceeding the ceiling; and be passed by a two-thirds vote in each house of the legislature.

Section 9, article VII of the State Constitution and section 37-93, Hawaii Revised Statutes, do not literally require a cumulative statement of the dollar amount and rate by which the general fund expenditure ceiling is exceeded in each successive bill which makes an appropriation in excess of the expenditure ceiling, but such a cumulative total would have to be maintained to identify those bills that contain such an appropriation. Any appropriation exceeding the spending limit which is contained in a bill which does not comply with all of the requirements of section 37-93, Hawaii Revised Statutes, is invalid.

89-3
(Mar. 16, 1989)

Grants, Subsidies, and Purchases of Service under Chapter 42, Hawaii Revised Statutes; Effect of Qualifications of Subcontractors. The qualifying standards of section 42-2, Hawaii Revised Statutes, are imposed only on the organization applying for a grant, subsidy, or purchase of service agreement. Because a subcontractor is not the organization applying for a service agreement, chapter 42 qualifying standards themselves are literally not applicable to a subcontractor of an applicant organization. However, to determine whether an organization meets the requirements of section 42-2, an agency can rely only upon information that relates to the organization itself. The ability of any other entity, including an "affiliate" of the organization to satisfy the standards of section 42-2 has no bearing.

STATE OF HAWAII

DEC 13 1989

LEGISLATIVE REFERENCE BUREAU

**Opinion No.
Date Issued**

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89-4
(April 20, 1989)

Public Hearings; Minimum Publication Requirements for Notices There is no statutory mandate that notices of public hearings for the adoption, amendment, or repeal of rules be published in any particular portion of a newspaper. Therefore, legal publication requirements for a notice of public hearing required under section 91-3(a)(1) are met when the notice appears in a part of the newspaper where a person who may be interested in the rules that are the subject of the hearing will likely see it. In addition, section 92-41, Hawaii Revised Statutes also requires that required hearing notices be published in county newspapers as well as in a newspaper with statewide circulation. For the City and County of Honolulu, the Honolulu Star-Bulletin and the Honolulu Advertiser are appropriate county newspapers and a single publication in either of those newspapers will meet the publication requirements of section 91-3(a)(1) and 92-41.

89-5
(Nov. 22, 1989)

Zoning Ordinance-Ohana Dwelling Unit. The term "additional dwelling unit" in Kauai county's ordinances is the same as "ohana dwelling unit" for purposes of the rules of the department of health relating to wastewater systems.

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LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII

LIST No. 34

STATE OF HAWAII

MAR 1 1991

Opinion No.
Date Issued

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LEGISLATIVE REFERENCE BUREAU

90-1
(June 13, 1990)

Change of Name Petitions. The "guardian of the person of the minor" permitted to petition for a minor's name change, undesection 574-5(b)(3), HRS, is a person appointed pursuant to part 2, art. V, of the Uniform Probate Code. While not now expressly required, written consent of the minor's parents should accompany petitions for name change filed by guardians. The legal guardian of an incapacitated adult may petition for a name change on behalf of the ward without notice to the ward's parents.'

90-2
(June 28, 1990)

Enhanced Retirement Benefits-Amount of Employee Contributions. Section 88-74, HRS, entitles certain categories of employees to receive enhanced 2-1/2 percent retirement benefits. Act 343, SLH 1989, classified all narcotics enforcement investigators and class C (noncontributory retirement plan members) investigators of the Department of the Attorney General as class A (contributory members) and thereby allowed them to receive the same. retirement benefits as police officers. Act 343 also required the affected employees to make contributions for their prior service in order to receive the enhanced benefits for those prior periods of service. Summarizes buy-back requirements or lack thereof for prior service that were applied to other categories of employees granted enhanced retirement benefits.

Those narcotics enforcement investigators who opted to join the noncontributory plan in 1984 must file, by July 1, 1990, a statement with the ERS to buy back prior service. Those narcotics enforcement investigators who were class C members, because section 88-47 required them to be so, must also file a buy-back statement but are not subject to the July 1, 1990, deadline.

90-3
(Aug. 27, 1990)

Special Management Area Permits. Whether a proposal to abandon an old road that may be still used for access to the beach requires a Special Management Area ("SMA") permit would depend upon the factual circumstances pertaining to access to the beach. Should the Maui County Council abandon the Old Pier Road, that legislative act is not a development. But should the Council or any other party physically close a beach access by way of a structure or other means, that act would be a development under section 205A-22(3)(A)(iv), HRS, which would require an SMA permit.

90-4
(Aug. 28, 1990)

Trust Companies-Charitable Trustee. An out-of-state national bank must obtain a trust company certificate under chapter 406, HRS, to act as a charitable trustee of a botanical garden located on Kauai.

90-5
(Sept. 5, 1990)

Trust Companies-Corporate Indenture Trustee. An out-of-state bank or trust company must be certificated as a trust company under chapter 406, HRS, to engage in corporate indenture trustee activities in Hawaii.

**Opinion No.
Date Issued**

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90-6
(Sept. 4, 1990)

Transient Accommodations Tax-Hotel Room Rentals to Airlines_ The rental of hotel rooms to airlines under leases with a term of 180 days or more (for use of crew members on Hawaii stop-overs) is not subject to the transient accommodations tax under section 237D-2(a), HRS.

90-7
(Sept. 12, 1990)

Sunshine Law-Dept. of Agriculture's Advisory Committee and Subcommittees. The Dept. of Agriculture's Advisory Committee on Plants and Animals comprises a governmental body within the meaning of section 92-2(1), HRS, which is subject to the part I of chapter 92, HRS, known as the "State Sunshine Law".

The subcommittees to the Advisory Committee on Plants and Animals, unlike subcommittees in the commonly understood sense of the term, are not made up of members of the Advisory Committee but are actually individual consultants who present their comments and recommendations in their individual capacities and who do not function as a deliberative body. Therefore, as presently constituted, the advisory subcommittees are not boards within the meaning of section 92-2(1) and are not subject to the Sunshine Law. However, the present subcommittees could **become boards** by virtue of rules establishing their creation_ and defining their duties, composition, and member qualifications. Subcommittees established pursuant to such rules would be subject to the Sunshine Law.

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**LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

List No. 35-Opinion
Nos. 90-8 to 91-5

Opinion No. D&E Issued	Digest
<p>90-8 (Dec. 21, 1990)</p>	<p>Civil Service; Probationary Periods. Section 14-3-32, Hawaii Administrative Rules(HAR), provides for discretionary reduction of probationary periods by periods of temporary service with respect to certain employees. Section 76-27, HRS, requires mandatory reduction of the initial probationary period by the period of temporary service. Section 14-3-32, HAR, conflicts with section 76-27, HRS, when applied in a discretionary manner to deny the reduction of probationary periods by periods of temporary service for persons who are hired initially from an appropriate eligible list to fill a temporary position and then hired permanently in the same or related position. The rule should be amended to conform to the statute. Because in certain situations, the net effect may be that no initial probationary period remains to be served, such temporary employees should be evaluated periodically during the period of initial hire.</p>
<p>90-9 (Dec. 21, 1990)</p>	<p>County Civil Service Commission-Eligibility of Public Employee as Member. Section 76-51, HRS, which governs the State Civil Service Commission and applies to county civil service commissions under section 76-78, HRS, prohibits any person employed in state or county government to be a member of the civil service commission. Section 78-5(b), HRS, which allows state officers and employees to be members of state or county boards and commissions, does not permit such officer or employee "to serve as a member of any civil service commission."</p> <p>Under a Hawaii Supreme Court ruling, actions of the Commission in which an ineligible member participated would be deemed valid because the ineligible member would be considered a de facto officer. However, in light of a federal case holding that in some instances the actions of an ineligible department or agency officer may be invalid, it is recommended that any member deemed ineligible resign as soon as possible because this opinion puts the Commission on notice.</p>
<p>91-1 (Jan. 3, 1991)</p>	<p>Liquor Lienses-"Public Place". Section 281-31, HRS, establishes 13 classes of liquor licenses. The definition of "public place" in section 281-1, HRS, does not override section 281-31's restrictions on who may be served liquor under the various classes of licenses. Although under section 489-2, which</p>

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defines “place of public accommodation” and 489-3 , HRS, discrimination on the basis of race, sex, color, religion, ancestry, or handicap is prohibited, the liquor commission may, if it wishes, approve an application for a class 5 liquor license to an applicant that must restrict access to owners and their guests pursuant to conditions of use imposed by the county planning department.

91-2
(Feb. 13, 1991)

School/Community-Based Management (SCBM) Schools-Waiver of Administrative Rules Chapter 91, HRS, “Administrative Procedure”, is a statute of general applicability and prohibits administrative rules to be waived. Chapter 296C, HRS, “School/Community-Based Management”, is a statute of specific applicability and expressly states that rules shall be waived. The Hawaii Supreme Court has recognized the principle of statutory construction that the specific statute will be seen as an exception to the general. Therefore, chapter 296C is self-executing and the Board of Education need not propose rules to establish the “legal basis” to waive rules previously adopted pursuant to chapter 91.

91-3
(July, 1991)

State Vehicles-Personal Use Value for Gross Income Tax Purposes .The personal use value of state vehicles (when taken to and from home) of the Department of Public Safety’s (PSD) Narcotics Enforcement Division investigators would not be included in their gross income for state and federal income tax purposes where the use is: (1) by law enforcement officers; (2) incidental to law enforcement functions; and (3) validly authorized by the PSD. The last requirement would be met by obtaining written permission from the governor upon written permission from the state comptroller for personal use of the state vehicles.

914
(Sept. 24, 1991)

Employees’ Retirement System (ERS)–Credit for Military Service Section 88-132.5, HRS, provides for ERS membership credit for honorable active military service for any ERS member who has eight years of credited ERS service, and describes active military service as that in time of war or declared national or state emergency. Although not an ERS member prior to his military service, the member presently has in excess of eight years of credited service. As a member of the Hawaii Army National Guard, the member was ordered to active duty for training from May 15 to Oct. 26, 1966. The U.S. Supreme Court has ruled that on such duty, a member of the national guard is deemed to be in the active military service of “the U.S. armed forces. Further, under federal law, the Vietnam Era is defined as a “period of war” . Therefore, the period in question should be deemed “in time of war” for purposes of section and the member is entitled to obtain membership credit for the period in question. (The member’s discharge form indicated that the service rendered was honorable.)

**Opinion No.
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**91-5
(Oct. 7, 1991)**

Proposed Rules-Changes After Public Hearing A substantial change requiring an additional hearing would generally be the inclusion of material on a subject that was not covered in the notice of the original hearing, or a change that was not advocated or discussed at the hearing. To determine whether a given change fits into either category, the department must examine the notice of the original hearing and the record of the hearing itself. As much material should be renoticed for public **hearings** as is necessary for interested parties to participate in the rest of the rulemaking process. When the change is to a part of a package that clearly is separate from the remainder, only that discrete portion need be reheard. If the changed part is logically connected to other parts of the package or if, standing alone, is difficult to understand, or incomplete or confusing, then additional material from the original package would need to be included to make the changed portion comprehensible. What is specifically required will differ from case to case.

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**LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

List No. 36-Opinion
Nos. 92-01 to 92-06

Opinion No. Date Issued	Digest
<p>92-1 (Jan. 24, 1992)</p>	<p>School-Based Health Center Pilot Program-Notification of Pregnancy or Venereal Disease AG Opinion No. 74-2, issued in January 1974, discussed section 577A-3, HRS, which mandated that the spouse, parent, custodian, or guardian of a minor patient be informed if the patient were diagnosed as pregnant or affected with venereal disease. Since January 1974, section 577A-3 has been amended in such manner that Op. No. 74-2 no longer applies. Under the current section 577A-3 the notification decision is left up to the treating physician's discretion in consultation with the minor who received medical treatment pursuant to chapter 577A, HRS.</p>
<p>92-2 (Feb. 28, 1992)</p>	<p>Liquor Commissions-Return of Excess Fees or Funds As used in section 281-17.5(e), HRS, the term "funds" is synonymous with the term "fees." Section 281-17.5(e) requires that any liquor commission receiving a license fee from a licensee in excess of the amount prescribed in this section shall revise its liquor license fee structure, and any excess funds shall be returned or credited annually to existing licensees. A review of the legislative history of section 281-17.5 indicates the equivalence of "fees" and funds."</p>
<p>92-3 (Apr. 23, 1992)</p>	<p>Seat Belts-Use in Three-Wheeled Vehicles Since a three-wheeled vehicle is considered a motorcycle under section 286-2, HRS, and there is no federal motor vehicle safety standard applicable to a "seat belt assembly" installed in a motorcycle, an operator of a three-wheeled vehicle is not required by section 291-11.6, HRS, to wear a seat belt that does not fall within the statutory definition of a "seat belt assembly" made applicable only to passenger motor vehicles.</p>
<p>92-4 (June 26, 1992)</p>	<p>Authority to Receive Gifts-Dept. of Agriculture The Department of Agriculture has inherent authority to accept gifts such as money, animals, or other items from the private sector to assist in its efforts to prevent the entry of brown tree snakes into the State, and to use those gifts in accordance with the donor's terms, provided those terms are not illegal. Under chapter 50A, HRS, the department has the responsibility to keep Hawaii free of imported agricultural pests. Because the gifts will be for use by the department to conduct an official function of the department, the provisions of section 84-11, HRS, relating to the</p>

unethical receipt of gifts by government employees and legislators, do not come into play.

92-5
(July 16, 1992)

Health Fund-Counties* Share of Costs. Under section 87-4, HRS, costs associated with or allocable to the operation and administration of the Hawaii Public Employees' Health Fund are properly charged to the counties even if the Health Fund does not in fact pay such costs or if such costs are paid by another state agency. Under section 87-4(d) the operations of the Health Fund benefit both the counties and the State, and the costs to operate the fund should be borne by each in proportion to the benefit received. Even though certain operating costs are not directly charged to, or paid by, the Health Fund, payment for those costs is in fact made by the State, e.g., office space and computer services. Unless an accounting of all expenses, direct or indirect, is made, the State would pay a disproportionate share of the administrative costs. Therefore, the Health Fund should obtain from the Departments of Accounting and General Services and of Budget and Finance, and any other state agency providing uncompensated services to the Health Fund, an accounting of all expenses incurred on behalf of the Health Fund.

92-6
(Aug. 20, 1992)

Six Day Notice of Meeting-calculated by Days Not Hours. Section 927, HRS, requires a board to file in the office of the lieutenant governor a notice of meeting at least six calendar days before the meeting. The filing deadline in section 92-7 should be established by using increments of days, rather than hours.

From the time of its enactment in 1975 to 1984, the section 92-7 notice requirement was 72 hours rather than six calendar days. It was noted that some members of the Lieutenant Governor's office calculate the notice requirement in increments of hours, a practice that probably originated when the statutory notice period was stated in hours rather than in days.

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**LISTING OF OPINIONS
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STATE OF HAWAII**

List No. 37--Opinion
No. 93-01

Opinion No. Date Issued	Digest
93-1 (Mar. 1, 1993)	Informally adopted children; hanai practice_ The term "hanai" generally refers to those children adopted informally under custom and usage but not formally in accordance with Hawaii law. Hanai children are not included in the meaning of children as used in sections 88-85 and 88-286, HRS, relating to death benefits.

**STATE OF HAWAII
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**LISTING OF OPINIONS
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STATE OF HAWAII**

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List 38 (Revised)

Opinion Nos. 94-1 to 94-4

DIGEST

Opinion No.

Date Issued

- 94-1** **Disclosure of Executive Session Deliberations in Appointment of Superintendent of Education.** Section 92-5(a)(2) of the Sunshine Law, I-IRS, permits boards to hold meetings closed to the public (executive sessions to consider personnel matters where the privacy of candidates for employment is involved. Board members may disclose matters which are deliberated in executive session except "matters affecting the privacy" of such candidates. Board of Education members may disclose their vote on the Superintendent's position and the reasons therefor but cannot disclose information discussed if of a type listed in section 92F-14(b) I-IRS, relating to an individual's privacy, unless the public interest outweighs such privacy interest.
- 94-2** **General Excise and Use Taxes and Original Package Doctrine.** Overrules (Oct. 17, 1994) Attorney General Opinion No. 64-38 which advised that Hawaii's general excise and use taxes could not be applied to imports in their original package, in light of U.S. Supreme Court decisions that have abandoned the "original package" doctrine. Hawaii's general excise and use taxes are general uniform taxes and do not offend the policy consideration underlying the Import-Export Clause of the U.S. Constitution which prohibits states from taxing imports. The State may apply those taxes to imported goods, no longer in transit, regardless of whether the goods are in their original package.
- 94-3** **Dischargeability of Court-Ordered Restitution in Bankruptcy.** If the debtor (Nov. 30, 1994) has not been convicted of a crime, the restitution will not be discharged if the debtor has filed for bankruptcy under chapter 7, 11, or 12, and restitution is payable to a governmental unit and is not compensation for actual pecuniary losses. Restitution under chapter 13 will be discharged if the court confirms the chapter 13 plan and debtor completes payments. Distinguishes between a complaint objecting to discharge and a complaint to determine dischargeability of a debt. Where the debtor has been convicted of a crime, all restitution debts are not dischargeable, except for completed chapter 13 cases filed prior to Nov 15, 1990.
- 94-4** **Applicability of the Public Procurement Code to the Administrator or Product (Dec. 21, 1994) Provider Contracts of the Deferred Compensation Plan.** Chapter 103D, HRS, the Hawaii Public Procurement Code ("Code"), does not apply to the Board of Trustees of the Deferred Compensation Plan's current administrator and investment-product-provider contracts because they were entered into before the Code's July 1, 1994 effective date. The Code would apply to contracts the Board enters into after that date if "public funds" are used to fund them. However, the Code would not apply if future contracts are funded exclusively with compensation of Plan participants deferred in accordance with section 457 of the Internal Revenue Code or the earnings from the investment of that deferred compensation because those funds are not "public funds" as that term is used in the Code.

STATE OF HAWAII
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LEGISLATIVE INFORMATION

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STATE OF HAWAII

List No. 3 - - Opinion
Nos. 95-0 1 to 95-04

Opinion No.
Date Issued

DIGEST

95-01
(Jan .12 , 1995) **Sufficient yof payment plan as basis for liqno license renewal** A taxpayer's agreement to pay its delinquent taxes, pursuant to a payment schedule, does not satisfy the requirements for liquor license renewal under section 281-45 (1994) and 231-2 (1985), HRS. Those sections require, as acondition of liquor license renewal, that an applicant obtain a certificate from the Director of Taxation showing that the applicant does not owe state taxes.

95-02
(May 8, 1995) **Reinsuranceof the State of Hawaii .** A company can be both an insurer and a reinsurer (with only the former being licensed and regulated by the State), and the status of a company, at any given time, depends on the type of coverage being provided and the nature of the insured .An entity providing third-party liability insurance to a self-insured entity (here, the State) is an insurer, not a reinsurer, and thus must comply with all applicable laws.

95-03
(July 17, 1995) **Authority to alienate public trust lauds.** Under the Admission Act and the State Constitution, the State is authorized to sell ceded lands .Any.proceeds of the sale or disposition must be returned to the trust and held by the State for use for one or more of the five purposes set forth in section 5(f) of the Admission Act . This authority (to sell trust lands) was in no way modified by the constitutional amendments made in 1978, specifically article XII, section 4, which refers to proceeds from the sale or disposition of ceded lands with a prospective allocation of such proceeds to OHA.

95-04
(Nov. 20, 1995) **Whether,divorcemen tconstitutes a "taking'bf private property for public use.** Section 486H-10 ,HRS, which prohibits manufacturers (producers or refiners of petroleum products on Jan. 1, 1992, or any subsidiary thereof) and jobbers (wholesalers of petroleum products) of petroleum products from operating a retail service station for the retail sale of petroleum products, is not an unconstitutional taking of private property for public use in violation of the eminent domain clauses of the constitutions of Hawaii and of the United States .Section 486H-10 ,HRS, does not deprive manufacturers and jobbers who own retail service stations of all economically viable use of their property . The statute does not prohibit an oil company from leasing its property to independent dealers, nor from owning retail service stations or making arrangements for them to be operated as retail outlets for the oil company's products. The statute only prohibits an oil company or its subsidiaries, employees, or agents from operating the station.

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List 40 - Opinion
Nos. 96-1 to 96-5

Opinion No.
Date Issued

DIGEST

96-1 Organizational placement of executive branch agencies. The State
(Feb. 16, 1996) Constitution, Art. V, sec. 6, requires that state executive branch agencies be placed within the principal departments of the executive branch of state government, unless they are commissions or agencies that are both temporary and for special purposes. The Office of the Governor is not a principal department of the executive branch, therefore, any agency that is not temporary and for special purposes cannot be validly placed within the Office of the Governor.

96-2 Water system development fees. Sec. 201E-210, I-IRS, does not exempt
(Aug. 9, 1996) housing developments of the Housing Finance and Development Corporation from compliance with the rules of the various county water boards.

96-3 Nominees for the Campaign Spending Commission. Sec. 11-192, HRS, as
(Aug. 21, 1996) amended by Act 10, Sp. Sess. Laws 1996, requires the Judicial Council to select a completely new panel of nominees for the Campaign Spending Commission. Sec. 11-192, as amended, does not contain a saving clause or a grandfather provision that relates to the retention of nominees for the Commission or of commissioners who were selected pursuant to the superseded statutory provisions.

96-4 Imposing durational limitations on political signs. Sec. 445-112(11), HRS, is
(Oct. 29, 1996) the only purported regulation of political signs on Oahu, restricting persons' rights to post political signs to the period 45 days before an election and 10 days afterwards. The section contains a content-based restriction which is presumptively unconstitutional. It grants commercial speech greater protection than noncommercial speech. It is not narrowly tailored to further the government's asserted interests in aesthetics and traffic safety, and there are no alternative, equally effective channels of communication. It is believed that sec. 445-112(11) would be held unconstitutional under both the U.S. and Hawaii constitutions and that the statute is unenforceable in a court of law.

96-5 Calculating a Majority on Calling for a Constitutional Convention.
(Nov. 19, 1996) The question placed on the 1996 general election ballot was, "Shall there be a convention to propose a revision of or amendments to the Constitution?" Of the 369,357 total ballots, 163,869 bore "yes" votes, 160,153 bore "no" votes, 45,245 were left blank, and 90 bore both "yes" and "no" votes and are considered "over votes" or spoiled ballots. The "yes" ballots constitute a majority of the cast upon such a question" under Art. XVII, sec. 2, of the State Constitution. Blank and over-voted ballots are not counted.

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List No. 41 . Opinion
Nos. 97-1 to 97-12

Opinion No.
(Date Issued)

DIGEST

- 97-1**
(Jan. 13, 1997) **Requirement for balanced budget.** There is no express requirement for a balanced budget in either the State Constitution or the applicable statutes. However, in operation, a balanced budget is required. The State Constitution, Art. VII secs. 5, 8, and 9 all relate to budget and spending, and all require a balanced budget. Att. Gen. Op. 83-4.
- 97-2**
(Mar. 10, 1997) **Constitutional issues relating to jury trial.** (Relates to proposed amendments in Senate Bill 201 (1997).) Proposed amendment to sec. 635-26, HRS, to change the number of jurors in civil cases, where there is no agreement by the parties, conflicts with the State Constitution, Art. I sec. 13; therefore, a constitutional amendment is required. A proposed amendment to sec. 806-60; HRS, to permit parties to stipulate to a jury of less than 12, but not less than 6 jurors, does not require a constitutional amendment because 6 jurors in cases involving non-serious crimes tracks the language of the State Constitution, Art. I, Sec. 14. The definition of "serious crimes," which triggers the constitutional right to a jury trial, is not limited to those crimes for which there is a possibility of imprisonment of at least 6 months.
- 97-3**
(Apr. 11, 1997) **Renunciation of succession in retirement benefits.** The facts in this case, concerning the payout of death benefits by the Employees Retirement System (ERS), occurred in 1995 when sec. 560:2-801, HRS, provided for "renunciation of succession." That section was amended in 1996 to refer to "disclaimer of property interests." The legal conclusion is the same. Sec. 88-93, HRS, provides that an ERS member's designation of beneficiary is null and void when the beneficiary predeceases the member. However, by operation of the renunciation of succession, the beneficiary is deemed to have predeceased the member.
- 97-4**
(May 14, 1997) **Effect of repeal of sec. 183-41, HRS on chap. 13-2, HAR.** Act. 270, SLH 1994, effective July 1, 1994, repealed sec. 183-41, HRS, regulating the conservation district. Sec. 183-41 was the legal authority for chap. 13-2, Hawaii Administrative Rules (HAR). Act 270 also created a new chapter 183, HRS, relating to the conservation district, and new rules, chap. 13-5, HAR, were promulgated. Chap. 13-5, HAR, supersedes chap. 13-2, HAR, as to all matters except permit applications filed before July 1, 1994. Notice requirements for the repeal of administrative rules are set forth in secs. 91-3(a) and 92-4 1,

Opinion No.
(Date Issued)

DIGEST

97-5
(Aug. 14, 1997)

Health insurance coverage for reciprocal beneficiaries. (This Opinion answers 2 of 7 questions asked. The remaining questions are answered in Op.97-10.) Act 383, SLH 1997, added a new chapter titled "Reciprocal Beneficiaries," newly numbered chap. 572C, HRS. Sec. 4 of Act 383 added a new section to article 10A of chap. 43 HRS, which is the insurance code. The new section 43:10A-601, HRS, generally requires that reciprocal beneficiary family coverage be made available to reciprocal beneficiaries. Sec. 43:10A-601 applies only to insurers and not mutual benefit societies or health maintenance organizations, which are governed by chaps. 432 and 432D, HRS, respectively.

97-6
(Sept. 2, 1997)

Privatization and civil service laws. Konno v. County of Hawaii, 85 Haw. 61 (1997), held that the civil service "encompasses those services that have been customarily and historically provided by civil servants," with certain exceptions, and neither privatization generally nor for the purpose of operating a government landfill is excepted from the civil service coverage of secs. 76-77, 76-16, or 46-33, HRS. In applying the "customary and historic" test, a jurisdiction can look to its own prior history only, not the State as a whole. There is no temporal limit as to what is considered customary and historic. Contracts under chap. 42D, HRS, are contracts to disburse appropriations and are not subject to the civil service laws or Konno. Laws such as sec. 143-15, HRS, relating to humane societies, are sufficiently specific to invoke the civil service exception conferred by sec. 76-77(10) and its state counterpart at sec. 76-16(17), HRS. Sec. 76-77, HRS, is not unconstitutional in that it only applies to Hawaii, Maui, and Kauai.

97-7
(Sept. 15, 1997)

Military active duty training. Discusses the application of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), PL 103-353, codified generally in 38 USC 4301-4333. An employer cannot refuse a request by an employee for military leave on the basis that the employee volunteered for such service. An employer's right to deny a request for military leave based on undue hardship is limited and contained in the USERRA. An employer is precluded from employment discrimination against an employee because of the employee's service in a uniformed service.

97-8
(Oct. 16, 1997)

Suspension of contractors for violation of chap. 104., HRS. Sec. 104-25, HRS, requires a contractor who is found to have violated chap. 104, HRS, for the third time within a 2-year period and who is currently performing a public works contract to be immediately suspended from doing work on the existing contract and prohibited from entering into new contracts for 3 years.

Opinion No.
(Date Issued)

DIGEST

Page 3

97-9
(Oct. 27, 1997)

DOE's TDI plans for full-time teachers and other part-time employees. The Dept. of Education (DOE) essentially has two temporary disability insurance (TDI) plans. One plan, approved by the Dept. of Labor and Industrial Relations pursuant to *sec. 392-4I(a)(5), HRS*, covers full-time teachers. DOE's A+ and other employees are paid benefits under the TDI law in chapter 392, HRS. If an individual is employed by the DOE as both a full-time teacher and an A+ employee and becomes disabled for both jobs, DOE must pay the individual under both TDI plans.

97-10
(Dec. 2, 1997)

Health insurance for reciprocal beneficiaries (This opinion answers the remaining questions from Op. No. 97-5.) Act 383, SLH 1997, is referred to herein as the reciprocal beneficiary act or RBA. RBA section 74 provides a specific mandate for narrow construction of the provisions of the RBA. Benefits must be made available by insurer to reciprocal beneficiaries not to employers. The employer is not required to pay the additional cost incurred by an employee's election for reciprocal beneficiary (RB) family coverage. It is the insurer who must make RB family coverage available to the extent that family coverage is made available. The RB provisions can only be enforced against insurers not employers.

97-11
(Dec. 22, 1997)

Former per diem judges' requests for prior service credit. Under section 6-21-8, Hawaii Administrative Rules, only months in which per diem service equal ten or more days are included as membership service in the Employees Retirement System (ERS) on a pro rata, full-time equivalent basis. Two retired judges, relying on section 88-58, HRS (1969), requested full prior service credit for the entirety of their per diem judge terms that immediately preceded their appointments as full-time district court judges in 1975 and 1981, respectively. The judges' retirement benefits were computed in accordance with the method approved in *Vail v. ERS*, 75 Haw. 42 (1993), granting them credited service for each month in which their per diem service equaled or exceeded ten days.

97-12
(Dec. 24, 1997)

Eligibility to Purchase Military Service Credit. Under sections 88-273 and 88-281, HRS, a former state employee who is a vested noncontributory plan participant is a member of the Employees Retirement System (ERS) eligible to apply for and be credited with military service credit, pursuant to section 88-132.5, HRS. The former employee began state service on 10-16-69 and terminated service on 1-2-90. On 3-9-94 he applied for retirement to become effective 4-9-94. On 3-9-94 he also applied for military service credit. Section 88-132.5 does not set a time by which a member must apply for military service credit.

Compiled by:
LEGISLATIVE REFERENCE BUREAU
As amended
May 20, 1998

**LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

List No. 42 - Opinion
Nos. 98-1 to 98-6

Opinion No.
(Date Issued)

DIGEST

98-1
(Feb. 2, 1998)

Enterprise zone in Waialua, Oahu. Section 2 of Act 262, SLH 1997, amended section 209E-4, HRS, by adding agricultural lands in Waialua as an enterprise zone (EZ) for 5 years from 7-1-97 to 6-30-02. Pursuant to section 209E-13, HRS, qualified businesses in the new EZ are eligible for 7-year tax benefits provided in sections 209E-10(a) and 209E-11, HRS, i.e., beyond the new EZ's 5-year sunset date. Because the Legislature bypassed the county application and executive approval process in designating the new EZ, the city & county of Honolulu is not required to provide incentives or perform administrative responsibilities in the new EZ.

98-2
(Mar. 3, 1998)

Advertisements by licensed massage therapists. Section 452-23(a), HRS, pertains to advertisements by licensed massage therapists. Paragraphs (4), (5), and (6) therein prohibit pictures depicting the human form other than hands, wrists, and forearms; using any term other than therapeutic massage or massage therapy to refer to the service; or referring to any personal physical qualities of the practitioner. These paragraphs are overly broad and infringe upon the commercial speech rights afforded by the First Amendment.

98-3
(Mar. 25, 1998)

Housing projects developed pursuant to Act 15, SLH 1988. Due to a critical need for affordable housing, the Legislature enacted Act 15, SLH 1988, to provide the Housing Finance and Development Corporation (HFDC) flexibility to develop housing projects without going through the review and approval process of the counties. The counties must accept HFDC certification as legal and binding, but they are not required to certify, record, or accept HFDC certifications into their records. The counties may require that HFDC file applications on matters subsequent to Act 15 certifications, such as amendments or extensions to an Act 15 subdivision plan.

Opinion No.
(Date Issued)

98-4
(July 13, 1998)

Escheat of abandoned property. Act 214, SLH 1996, amended Hawaii's unclaimed property law, chapter 523A, HRS, to permit escheat of abandoned property. Act 214 amended section 523A-1, HRS, by adding the definition of "escheat" to mean "the taking of title or interest by the State of property presumed abandoned." Prior to this amendment, the State was merely the custodian of the property until it was claimed by the owner, if at all. Before the property escheats, the State must give statewide public notice. If the value of the property is \$5000 or less, the names of the owners need not be included in the public notice but the notice must state where a list of names and last known addresses of the owners may be found. Act 214 is constitutional, but a court could come to a different conclusion regarding the high (\$5000) threshold before names of last known owners are included in the public notice.

98-5
(Aug. 10, 1998)

Noncandidate committees. Section 11-204(b), HRS, which prohibits persons or entities from making contributions to noncandidate ballot measure committees, and section 11-204(j), HRS, which provides that no "corporation or other organization" may contribute to noncandidate committees "unless the noncandidate committee has been in existence continuously...for at least twelve months prior to the next primary election," are unconstitutional because they violate First Amendment rights of association and speech.

98-6
(Aug. 27, 1998)

Division chief acting as hearings officer. In the absence of a statute or departmental administrative rule requiring that a hearings officer from outside the department conduct administrative hearings, a division chief may be presumed to be unbiased and may act as a hearings officer in administrative hearings involving programs in the chief's division, with certain internal safeguards in place to avoid an actual conflict or the appearance of administrative impropriety.

Compiled by:

LEGISLATIVE REFERENCE BUREAU
January 12, 1998

**LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

List No. 43 - Opinion
No. 99-1

Opinion No.
(Date issued)

DIGEST

99-1 (Mar. 19) 1999	Regulation of radioactive material in Hawaii County. Chapter 14, Article 8 ("Nuclear Energy") of the Hawaii County Code regulates the transportation and storage of radioactive material in Hawaii County. A ballot initiative was proposed to amend Art. 8 by prohibiting the transportation into and storage of any radioactive material used in an irradiation facility. Both the initiative and Art. 8 may be unconstitutional because: (1) under Article VI, clause 2 of the U.S. Constitution (supremacy clause), Art. 8 and the proposed amendment are preempted by the Atomic Energy Act of 1954, 42 USC section 2011-2297g-4; and (2) under Article I, section 8, clause 3 of the U.S. Constitution (commerce clause), the proposed amendment impermissibly regulates the flow of interstate commerce and thus violates the commerce clause.
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Compiled by:
LEGISLATIVE REFERENCE BUREAU
January 12, 2000

**LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

List No. 44 - Opinion
Nos. 2000-01 to 2000-02

Opinion No.
(Date issued)

DIGEST

2000-01
(Feb. 9, 2000)

Government Employees' Retirement Benefits -- "High-3 Reform". Act 374, SLH 1997, modified the calculation of public employee retirement benefits to require that a separate "average final compensation" (AFC), the average salary earned during a member's three (or in some cases, five) highest paid years of credited service, be made for each category of service--elective officer, legislative officer, judge, and "other." A single AFC will not apply if an individual has more than one category of service. The effective date of the Act is July 1, 1997. However, section 7 of the Act specified two "non-impairment" dates: (1) benefits of elective and legislative officers in office on July 1, 1997, accrued up to Nov. 3, 1998 (the 1998 general election day), shall not be diminished or impaired, and (2) benefits of other elective or legislative officers accrued up to June 30, 1997, shall not be diminished or impaired. The general rule under Act 374 is that the Employees' Retirement System must bifurcate the calculation for pre- and post-Act service and calculate the AFC for each category of service. However, this general rule should not apply to an individual who, on July 1, 1997, and November 3, 1998, was an elective officer and remains in that category throughout the individual's entire public service. This opinion addresses the issue only as it relates to elective officers.

2000-02
(Rev. Sept. 29,
2000)

Health Care Information Privacy Act. (This opinion, addressed to Governor Benjamin J. Cayetano, replaces Opinion No. 2000-02, dated July 25, which was addressed to Lt. Governor Mazie K. Hirono. There is no substantive change in the opinion.) Chapter 323C, HRS, is Hawaii's new law on the privacy of health care information. It requires caution and safeguards when state agencies record, use, and disclose protected health information. In many ways it is consistent with existing laws. The opinion covers 3 broad areas: (1) General effect of Chapter 323C on state operations, (2) Chapter 323C's provisions on the use and disclosure of protected health information in state hands, and (3) the relationship of Chapter 323C to other confidentiality laws.

STATE OF HAWAII

JAN 17 2001

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LEGISLATIVE REFERENCE BUREAU
January 16, 2000

**LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

List No. 45 – Opinion
Nos. 03-1 to 03-6

Opinion No.
(Date issued)

DIGEST

03-1
(Feb. 7, 2003)

School vouchers. In *Zelman v. Simmons-Harris*, -- U.S. --, 122 S. Ct. 2460 (2002), the U.S. Supreme Court held that the Ohio school voucher program did not violate the Establishment Clause of the U.S. Constitution, which prevents a state from enacting laws to advance or inhibit religion. *Zelman* is inapposite in Hawaii because a Hawaii school voucher program would be precluded under Art. X, section 1, of the Hawaii Constitution and not the Establishment Clause of the U.S. Constitution. Considering the Hawaii Supreme Court's previous interpretation of Art. X, section 1, in *Spears v. Honda*, 51 Haw. 1, 449 P.2d 130 (1968), which addressed the constitutionality of a statute requiring state-subsidized bus transportation for all school children, including sectarian and private school students, a school voucher program would violate the Hawaii Constitution.

03-2
(Mar. 28, 2003)

Executive restrictions on appropriations and lapses. There appears to be no reason why the executive branch cannot exercise its authority under part II of chapter 37, HRS, to reduce allotments for the fiscal year in progress. It would be improper for the biennial budget for fiscal biennium 2003-2005 to incorporate as revenues the proposed restrictions for FY 2002-2003 unless those restrictions were reflected as reduced appropriations in the budget adopted legislatively for FY 2002-2003. Under section 37-65, HRS, among the responsibilities of the governor are to formulate a proposed six-year state program and financial plan and a proposed state budget. The six-year program and financial plan and budget are planning documents and require the executive to estimate costs and resources. Using historical data to make estimates for a future fiscal period is an acceptable planning tool.

03-3
(Apr. 11, 2003)

Legal title to biogenetic resources from public lands. The State holds legal title to biogenetic resources gathered from public lands, including ceded lands, if it reserved title to said resources when it allowed third persons to remove natural resources from which the biogenetic resources were extracted, or it transferred title to the land from which the biogenetic resources came. The scope of the University of Hawaii's authority to sell or transfer biogenetic resources from ceded lands depends upon how it acquired the ceded land from which the resource originated. As a result of *OHA v. State*, 96 Haw. 388 (2001), the Legislature must again determine which income from public land trust lands are to go to the Office of Hawaiian Affairs (OHA). Until the Legislature re-establishes a funding mechanism for OHA, Executive Order No. 03-03 is the only mechanism for transferring receipts from the use of ceded lands to OHA. Receipts from biogenetic resources do not qualify for transfer under the order.

03-4
(May 30, 2003)

Ceded land receipts to OHA without legislative appropriation. Receipts derived from ceded lands apportioned for native Hawaiians pursuant to the Hawaii Constitution, Art. XII, section 6, and section 10-13.5, HRS (1985), may be transmitted directly to the Office of Hawaiian Affairs (OHA) by the agencies that collect them, without legislative appropriation, for three discrete reasons. The Constitution prescribes a process separate and different from the appropriation process in Art. VII, section 5, of the Constitution for making ceded land receipts available to native Hawaiians. Second (and alternatively), native Hawaiians' share of ceded land receipts does not belong to the State, and thus is not "public money." Third (and alternatively), even if the receipts agencies collect for the use of ceded lands are "public money," the transfer of receipts to OHA does not constitute an "expenditure."

03-5
(Aug. 18, 2003)

Medical acupuncture. Medical acupuncture is not sufficiently distinct from traditional acupuncture so as to fall outside the scope of the practice of acupuncture, and physicians licensed by the Board of Medical Examiners cannot practice medical acupuncture absent licensure by the Board of Acupuncture.

03-6
(Aug. 22, 2003)

Three readings of a bill. The Hawaii Constitution, Art. III, section 15, provides, "No bill shall become law unless it shall pass three readings in each house on separate days." S.B. No. 1394, which became Act 172, SLH 2003, was validly and constitutionally enacted although it did not pass second reading in the Senate. It did pass three readings in the Senate on January 22, March 4, and May 1, 2003, the last being the third reading when the bill passed its final reading after the Senate reconsidered its disagreement with the House amendments. In addition, the Senate President and the Senate Clerk certified that the bill passed final reading in the Senate.

**2005 LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

OPINION NO. (Date Issued)	DIGEST
<p style="text-align:center">05-1 (May 20, 2005)</p>	<p>Senate Rule 31. Senate Resolution No. 137 (2005) added a third paragraph to Senate Rule 31, allowing a majority of the Senate to convene a meeting of the Senate “at any time for the purpose of carrying out the Senate’s responsibilities under article III, section 12” of the State Constitution. Rule 31(3) is constitutional. The Senate may meet at any time to choose its officers or to adopt or amend its procedural rules, regardless of whether the Senate or the Legislature is in session. Persons elected pursuant to Rule 31(3) may serve immediately and rules adopted pursuant thereto would be effective immediately. Section 22-1, HRS, provides that the presiding officers of each house shall continue to serve in that capacity during the interim between the two regular sessions of the each Legislature. Rule 31(3) does not violate section 22-1 because it merely establishes a portion of the process members must follow to terminate or choose their officers.</p>
<p style="text-align:center">05-2 (July 8, 2005)</p>	<p>Governor’s p roclamations on House and Senate bills. The Governor issued proclamations on June 27, 2005, for House Bills 1309, 1548, 1556, and 1715, and Senate Bill 813, to give the Legislature 10 days’ notice of her intent to return those bills for its further consideration on July 12, 2005, and to preserve her ability to veto those bills, in compliance with article III, section 16, of the State Constitution. The Governor’s proclamation for each of the bills contained what was obviously a clerical error in that the bill number (House Bill No. 85) in the closing paragraph did not match the bill number in the preceding two clauses. However, the second clause of the five subject proclamations contained not only the correct bill number but the corresponding bill title. The Governor also issued a transmittal letter on June 27, 2005, to which all 33 proclamations issued that day were attached. Because the five subject bills were listed in the transmittal letter, the Governor clearly indicated her intention to return all five subject bills with her objections.</p>

**2006 LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

OPINION NO. (Date Issued)	DIGEST
06-1 (May 8, 2006)	Applicability of Chapter 104, HRS, to county housing projects. Chapter 104, HRS, which requires that the laborers and mechanics working on a public work project be paid the prevailing wage established by the State Director of Labor and Industrial Relations, applies to Hawaii County's Waikoloa Employee Housing Project (project) pursuant to sections 46-15.01 and 104-2, HRS. The project is being undertaken pursuant to section 46-15, relating to experimental and demonstration housing projects. Section 46-15 exempts such projects from laws governing planning, zoning, construction, etc., but section 46-15.01 explicitly provides for the application of chapter 104. Section 104-2(a) provides, in part, that chapter 104 shall not apply to a 46-15 project if the cost is less than \$500,000. However, the Waikoloa project is estimated to cost in excess of \$350 million.

Compiled by:
LEGISLATIVE REFERENCE BUREAU
January 5, 2007

**2007 LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

OPINION NO. (Date Issued)	DIGEST
<p style="text-align: center;">07-1 (April 3, 2007)</p>	<p>Timely judicial selections by the Chief Justice. On March 1, 2007, the Judicial Selection Commission presented the Chief Justice with two lists of nominees to fill two district court vacancies. The Chief Justice made his selections on Monday, April 2, 2007. The thirtieth day from March 1 was Saturday, March 31, 2007. Article VI, section 3, of the Hawaii Constitution provides in relevant part, "If the chief justice fails to make the appointment within thirty days of presentation,...the appointment shall be made by the judicial selection commission...." Unlike other provisions in the Constitution that specifically exclude Saturdays, Sundays, and holidays, Article VI, section 3, contains no such provision. Under the plain language of article VI, section 3, the Chief Justice's nominations were untimely, and the appointments must be made by the Judicial Selection Commission.</p>
<p style="text-align: center;">07-02 (Sept. 11, 2007)</p>	<p>Setting aside State lands for a nonprofit organization. Act 3, 1st Spec. Sess. Laws 2007, required the Hawaii Community Development Authority (HCDA) to set aside State lands for use by the Kewalo Keiki Fishing Conservancy (KKFC), a private nonprofit section 501(c)(3) organization. Article XI, section 5, of the Hawaii Constitution states: "The legislative power over the lands owned by or under the control of the State and its political subdivision shall be exercised only by general laws,..." A statute relating to particular persons, places, or things is a special law, not a general law. Act 3 can only be interpreted as special legislation because it was enacted to benefit the KKFC specifically and is limited to a specific property, and it therefore violates Article XI, section 5, of the Hawaii Constitution.</p>
<p style="text-align: center;">07-03 (Nov. 2, 2007)</p>	<p>Appointment of Judicial Selection Commission's administrative assistant. On Sept. 28, 2007, the Judicial Selection Commission adopted Rule 3.1, "Commission Staff," which designated the Commission as the appointing authority for its staff and exempted such staff from the civil service (chap. 76, HRS) and collective bargaining (chap. 89, HRS). A copy of Rule 3.1 was sent to the Administrative Director of the Courts with a request that the Judiciary immediately cease all efforts to appoint an administrative assistant for the Commission. Despite the request, the Judiciary interviewed applicants and selected one to fill the administrative assistant position. Rule 3.1 was promulgated pursuant to the Commission's constitutional authority under the fifth paragraph of section 4 of Article VI of the State Constitution, which states in pertinent part: "The commission shall adopt rules which shall have the force and effect of law." Rule 3.1 is enforceable by a civil action under section 603-23, HRS, or by a petition for writ of mandamus under section 602-5(a)(3), HRS, and Hawaii Rules of Appellate Procedure rule 21(b).</p>

**2008 LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

OPINION NO. (Date Issued)	DIGEST
08-1 (August 1, 2008)	Random drug testing of teachers. Implementation of bargained for suspicionless random drug testing of public school teachers is constitutional and would not violate federal or state constitutional provisions, if adequate and appropriate procedural protections are put in place. The teachers' union agreed to such random drug testing in the collective bargaining agreement that was ratified by a vote of the full membership. See <i>Bolden v. Southeastern Pennsylvania Transportation Authority</i> , 953 F.2d 807 (3d Cir. 1991), <i>cert. denied</i> , 504 U.S. 943 (1992). Public education in Hawaii is heavily regulated. Hawaii courts have upheld drug testing of police officers (random) and firefighters (as part of annual physical) in <i>McCloskey v. HPD</i> , 71 Haw. 568, 799 P.2d 953 (1990) and <i>Doe v. City & County of Honolulu</i> , 8 Haw. App. 571, 816 P.2d 306 (1991), respectively. If a court were to find this drug testing program of teachers unconstitutional, the doctrines of qualified immunity, both federal and state, would shield state officials from any personal liability. See <i>Wilson v. Layne</i> , 526 U.S. 603 (1999) (citing <i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) and <i>Towse v. State</i> , 64 Haw. 624, 647 P.2d 696 (1982)).

**2011 LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

OPINION NO. (Date Issued)	DIGEST
11-01 (February 28, 2011)	48-hour review period for a bill. On Thursday, February 17, 2011, a Senate bill amended by the House was decked in the House. Article III, section 15, of the Hawaii Constitution provides, in part: "No bill shall pass third or final reading in either house unless printed copies of the bill in the form to be passed shall have been made available to the members of that house for at least forty-eight hours." The 48-hour period was up on Saturday, a non-session day, so the House could not pass the bill on final reading until the next session day, Tuesday, February 22. It was believed that as soon as the House passed the bill, certified it, and sent it to the Senate on February 22, the Senate could pass the bill on final reading because the 48-hour review period for this bill for the Senate began when the bill was made available to the House on February 17. Attorney General Opinion No. 70-7 was cited as supporting this conclusion. However, that opinion addressed only the issue of whether the review period was satisfied in the House; it does not address the issue of whether the review period requirement is satisfied for both houses by the initial printing in one house. Article III, section 15, of the Hawaii Constitution requires a separate 48-hour period in the Senate after the House has passed, certified, and transmitted the final version of the bill to the Senate.
11-02 (October 19, 2011)	Tax filing status of civil union partners. Civil union partners under the State's Civil Union Act, (Act 1, SLH 2011), have the same tax filing status options as married couples for Hawaii income tax purposes for taxable years beginning after December 31, 2011. The definitions of "marriage" and "spouses" under the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, which are limited to one man and one woman, may preclude civil union partners from filing jointly for federal income tax purposes but do not preclude civil union partners from filing joint tax returns for Hawaii income tax purposes.

Compiled by:
LEGISLATIVE REFERENCE BUREAU
January 6, 2012

**AMENDED 2013 LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

OPINION NO. (Date Issued)	DIGEST
<p style="text-align: center;">13-01 (October 14, 2013)</p>	<p>Constitutional authority of the Legislature to recognize same-sex marriages. An opinion was requested on three questions related to the marriage equality bill circulated by the Governor's Office on September 9, 2013 (the Proposed Bill): (1) whether the Legislature may enact legislation that would recognize marriages between two individuals of the same sex without the electorate or the Legislature amending Article I, section 23, of the Hawaii Constitution; (2) whether the Legislature has the authority, under the Hawaii Constitution, to pass the Proposed Bill; and (3) whether the Proposed Bill is consistent with the federal and state constitutions, given the Legislature's authority as described in Article I, section 23, and Article III, section 1, of the Hawaii Constitution. The answer to all three questions is an unqualified yes. The authority to enact legislation recognizing marriages between two individuals of the same sex is vested in the Hawaii State Legislature. The plain language of Article I, section 23, does <i>not</i> compel the Legislature to limit marriages to one man and one woman; it gives the Legislature the <i>option</i> to do so. No amendment to the Hawaii Constitution is necessary to give the Legislature the authority to enact the Proposed Bill, should the Legislature choose to pass it. And the subject matter of the Proposed Bill is consistent with the Legislature's authority "over all rightful subjects of legislation" as described in Article III, section 1, of the Hawaii Constitution. (Emphasis added.)</p>
<p style="text-align: center;">13-02 (December 20, 2013)</p>	<p>Inclusion of a party or group name on the general election presidential ballot. To the question of whether Hawaii's election laws allow for the inclusion of the name of a presidential candidate's affiliated group or party with the candidate's name on the general election ballot, if that group or party is not qualified as a political party under sections 11-61 and 11-62, HRS, the Attorney General answered in the affirmative. Regardless of whether the affiliated group or party is qualified as a political party under sections 11-61 and 11-62, the presidential general election ballot must include both the candidate's name and the candidate's affiliated group or party, if the other legal requirements for inclusion on the ballot are met. Section 11-113, HRS, governs presidential ballots. Section 11-113(c)(2) provides a mechanism for candidates from non-qualified parties or groups to appear on the presidential ballot. While section 11-113 does not address the contents of the presidential ballot, section 11-112, HRS, does, stating in paragraph (a), in part: "The ballot shall contain the names of the candidates, <i>their party affiliation</i> or nonpartisanship in partisan election contests, the offices for which they are running, and the district in which the election is being held." (Emphasis added.)</p>



**2014 LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

OPINION NO. (Date Issued)	DIGEST
14-01 (March 17, 2014)	Management and disposition of geothermal resources on DHHL lands. Two questions were presented: (1) whether the Dept. of Hawaiian Home Lands (DHHL) is entitled to 100 percent of royalties from geothermal projects on all lands controlled by DHHL, and (2) whether DHHL, as opposed to the Board of Land and Natural Resources (BLNR), is authorized to manage and dispose of geothermal resources on DHHL lands. The Attorney General answered both questions in the affirmative. (1) Section 4 of the Admission Act expressly directs that “all proceeds and income” from Hawaiian home lands must be used in carrying out the provisions of the Hawaiian Homes Commission Act (HHCA). Article XII, sections 1 and 3, of the Hawaii Constitution similarly require all proceeds and income from Hawaiian home lands to be used in accordance with the terms of the HHCA. Royalties derived from geothermal resources development constitute “proceeds and income.” (2) Section 204 of the HHCA provides that all Hawaiian home lands are to be controlled by DHHL and requires such lands to be used and disposed of only “in accordance with the provisions of this Act.” And although BLNR has been designated by statute to regulate the use of natural resources on lands owned by the State, section 206 of the HHCA provides that the “powers and duties of the . . . board of land and natural resources shall not extend to lands having the status of Hawaiian home lands” (emphasis added).

Compiled by:
LEGISLATIVE REFERENCE BUREAU
December 30, 2014

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**2015 LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

OPINION NO. (Date Issued)	DIGEST
15-01 (September 8, 2015)	County surcharge on state tax. Under section 248.2.6(a), HRS, the ten percent of the county surcharge retained by the State – including amounts, if any, that exceed the actual amount to reimburse the State for the costs of assessment, collection, and disposition of the county surcharge on state tax incurred by the State – are proper general fund realizations. The State’s retention of these amounts is consistent with a plain reading of the statute, consistent with legislative intent, and does not offend the equal protection and due process clauses of the state or federal constitutions.
15-02 (November 19, 2015)	Legislature’s authority to create an exemption from the State Ethics Code. In the context of “technology transfer” activities at the University of Hawaii, three questions were presented: (A) May the Legislature, consistent with article XIV of the Hawaii Constitution, exempt a state entity or the entity’s employees from the State Ethics Code, chapter 84, HRS? (B) If exempting an employee is not permissible under article XIV, is there another constitutional means to exempt certain conduct, such as technology transfer activities? (C) If an exemption is structured to exempt conduct rather than an employee, what are the constitutional limitations of the Legislature’s authority to determine the scope of the Ethics Code? Short answers: (A) No. Article XIV makes the application of a State Ethics Code mandatory to state employees, such as employees of the University of Hawaii. (B) Yes. Both the text and history of article XIV make clear that the Legislature determines the scope of the ethics code itself. It may therefore be possible to craft an exemption for certain <i>conduct</i> , while ensuring that <i>employees</i> remain subject to the code. (C) The only limitations are those set by article XIV and other provisions of the state and federal constitutions. Article XIV requires that the code address certain topics, such as gifts and the use of confidential information, but does not specify what conduct is permissible for each of these topics. Consequently, the Legislature may constitutionally exercise substantial discretion over what conduct the ethics code prohibits, permits, or otherwise regulates.

Compiled by:
LEGISLATIVE REFERENCE BUREAU
December 30, 2015

**2016 LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

16-01

(Jan. 27, 2016)

Legality of daily fantasy sports contests. Daily fantasy sports contests constitute illegal gambling under Hawaii law. The Attorney General concludes that the "activity involved in daily fantasy sports betting is gambling under the plain meaning of Hawaii's gambling statute." According to the Attorney General opinion, section 712-1220, HRS, sets out three requirements to meet the definition of "gambling," stating in part:

A person engages in gambling if [1] he [or she] stakes or risks something of value [2] upon the outcome of a contest of chance or a future contingent event not under his control or influence, [3] upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome.
(edits supplied)

Daily fantasy sports betting meets each of these requirements: (1) "the amount wagered on each daily fantasy sports contest is 'something of value' that is being 'stake[d]' despite being called an 'entry fee'"; (2) they are contests of chance under state law, because "chance is a material element for the vast majority of players" or because the contests "involve future contingent events not under the control of players"; and (3) "daily fantasy sports companies lay out in detail what players will receive on the basis of certain outcomes."

16-02

(March 9, 2016)

Applicability of the Procurement Code to gifts accepted by the State. The Hawaii Public Procurement Code, chapter 103D, HRS, does not apply to the State's acceptance of gifts from private donors. The Legislature enacted the Procurement Code by Act 8, Special Session Laws of Hawaii 1993, to "ensure fiscal integrity, responsibility, and efficiency" in the expenditure of public funds for the acquisition of goods, services, or construction for the State. Section 103D-102(a), HRS, states in part (emphases added): "This chapter shall apply to all procurement contracts made by governmental bodies...; provided that nothing in this chapter or rules adopted hereunder shall prevent any governmental body from complying with the terms and conditions of any other grant, gift, bequest, or cooperative agreement." The Code's provisions requiring competitive sealed bidding and other methods for the purchase of goods, services, or construction and provisions requiring certifying the availability of funds for said purchases literally apply to the expenditure of public funds under procurement contracts, not to the acceptance of gifts by the State.

16-03

(July 15, 2016)

Governor's interim appointment to the Public Utilities Commission (PUC). The Governor is authorized by article V, section 6, of the Hawaii Constitution to appoint a successor member to the PUC when the term of the incumbent member expires, irrespective of whether the incumbent continues to serve as a holdover member under section 269-2, HRS. The relevant portion of article V, section 6, states: "When the senate is not in session and a vacancy occurs in any office, appointment to which requires the confirmation of the senate, the governor may fill the office by granting a commission which shall expire, unless such appointment is confirmed, at the end of the next session of the senate." As part of the State Constitution, this provision is superior to the statutory law governing holdover members on a state board, including the PUC.

16-04

(July 25, 2016)

Availability of veto override vote. The Senate may vote to override the Governor's veto after the first day of the forty-fifth-day special session. Article III, section 16, of the State Constitution provides in pertinent part in the paragraph relating to reconsideration of vetoed bills returned after adjournment: "The legislature may convene at or before noon on the forty-fifth day in special session, without call, for the sole purpose of acting upon any such bill returned by the governor." Article III, section 17, of the State Constitution, which provides the general procedures upon veto, "does not expressly require that the vote on a vetoed bill must occur only on the same day of receipt of the vetoed bill." Furthermore, article III, section 15, of the State Constitution provides that "[n]o bill shall pass third or final reading in either house, unless printed copies of the bill in the form to be passed shall have been made available to the members of that house for at least forty-eight hours." Accordingly, "[i]f the Legislature is considering possible amendments to the returned bill, final actions on an amended bill cannot be taken on the first day of the forty-fifth-day special session." The Attorney General opinion concluded that "[b]ased on these constitutional provisions pertaining to the Legislature's procedures upon veto and the forth-fifth-day special session, ... the Legislature either may vote to override the veto, or may amend and pass the returned bill, or may take no action on a returned bill during the special session. We believe that the option to vote to override the veto would be available during the special session and we found no constitutional provision requiring that a veto override vote must occur only on the first day of the forty-fifth-day special session."

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2017 LISTING OF OPINIONS ISSUED BY THE ATTORNEY GENERAL STATE OF HAWAII

OPINION NO. (Date Issued)	DIGEST
17-01 (December 11, 2017)	<p>Shoreline encroachment easements. The Board of Land and Natural Resources (Board) requires private owners of coastal properties to obtain easements for structures that were originally constructed on private property but are now located on State-owned land due to the landward migration of the shoreline. Six aspects of the issue were addressed: (1) Regarding the dividing line between public and private property for oceanfront property, the State owns all lands makai of the "the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves." This description is referred to as the "shoreline." (2) If the shoreline moves landward, then the ownership line also moves mauka. (3) The State already owns an inchoate interest in land that might be gained through erosion or sea level rise. Ripening of this inchoate interest is not "acquisition" of land under statutes that require the Board or the Attorney General to approve "acquisition" of real property. (4) This result does not violate private owners' due process rights or constitute a "taking" of private property. (5) Ownership of land by erosion or sea level rise is not an acquisition of land, and the State is not acquiring land under statutes requiring the Attorney General to review and approve land acquisitions. (6) The Board can require the former landowner to pay fair market value in order to obtain an easement or other interest in land now owned by the State. Applicable statutes specifically provide for payment of fair market value in most cases.</p>

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2018 LISTING OF OPINIONS ISSUED BY THE ATTORNEY GENERAL STATE OF HAWAII

OPINION NO. (Date Issued)	DIGEST
18-01 (September 11, 2018)	<p>Availability of unconcealed-carry licenses. Section 134-9, HRS, provides in part that “[w]here the urgency or the need has been sufficiently indicated, the respective chief of police” may issue a license authorizing an otherwise-qualified applicant who “is engaged in the protection of life and property” to carry an unconcealed firearm within the county. In <i>Young v. Hawaii</i>, a divided panel of the Ninth Circuit construed this provision as “[r]estricting open carry to those whose job entails protection life or property,” such as “security guard[s].” Based on this interpretation, the panel concluded that section 134-9, HRS, “necessarily restricts open carry to a small and insulated subset of law-abiding citizens” and thus violates the Second Amendment’s protection of “the right of <i>individuals</i> to keep and to bear arms[.]” 896 F.3d 1044, 1071 (2018). This interpretation is overly restrictive. Section 134-9 authorizes the issuance of such licenses to anyone “engaged in the protection of life and property” who demonstrates a sufficient “urgency” or “need” to carry a weapon. An applicant must satisfy four criteria to obtain an unconcealed-carry license: (1) meet the objective qualifications for possessing and carrying a firearm; (2) demonstrate a sufficient need to carry a firearm for the purpose of protecting life and property; (3) be of good moral character; and (4) present no other reason justifying the discretionary denial of a license. To satisfy these requirements, an applicant must demonstrate, among other things, a need for protection that substantially exceeds that held by ordinary law-abiding citizens.</p>

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**2019 LISTING OF OPINIONS
ISSUED BY THE ATTORNEY GENERAL
STATE OF HAWAII**

OPINION NO. (Date Issued)	DIGEST
N/A	The Attorney General did not issue any opinions in 2019.

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