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| MEMORANDUM **TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES** |

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| TO: | Department of Family and Protective Services Logo**Chair and Members Department of Family and Protective Services Council** |
| FROM: | **John J. Specia, Jr.**  **Commissioner** |
| SUBJECT: | **Agenda Item 6a: Recommendation to adopt rule changes in 40 TAC, Chapter 745, Licensing, to clarify confidentiality requirements relating to Child Care Licensing abuse or neglect investigation records** |
| DATE: | **January 18, 2013** |

## BACKGROUND AND PURPOSE

The Child Care Licensing (CCL) Program is recommending changes to 40 Texas Administrative Code (TAC) Chapter 745, Licensing. The recommended changes clarify confidentiality requirements relating to CCL abuse or neglect investigation records.

**Who Has Access to Confidential Records**

CCL abuse or neglect investigation records are confidential and are only released to certain individuals authorized to request the record as specified in §745.8491.

Currently, the rule permits a parent of the child who is the subject of the investigation to obtain confidential information. CCL is amending the rule to also permit a parent of the child who is an alleged perpetrator in the investigation to obtain confidential information from the record.

Currently, the rule permits an operation to obtain confidential records if the operation was cited for abuse and neglect during the investigation. CCL is amending the rule to permit the operation to obtain confidential records if the operation was cited for any deficiency as a result of the investigation. Currently, the rule states that records will be released to an operation that is “cited for "abuse or neglect;" however, CCL may also cite an operation for other deficiencies as a result of an abuse/neglect investigation. This change would allow an operation to obtain information related to the incident so that the operation could better address problems with its compliance and/or challenge the deficiencies at an administrative review.

The rule amendment also adds language that allows, with a signed release from an operation, a single-source continuum contractor (SSCC) for foster care redesign that subcontracts with the operation to obtain abuse/neglect investigation information when the operation is cited for a deficiency as a result of the investigation. This addition is necessary so that a SSCC for foster-care redesign can have access to all information applicable to operations that it contracts with in order to monitor their performance. The SSCC would need to see information about an investigation that occurred at an operation in order for the SSCC to do its part to ensure the safety of the children there.

The proposed rule amendment also allows prospective adoptive parents to examine CCL abuse or neglect records related to the child they plan to adopt whether the child is the subject of the investigation or an alleged perpetrator in the investigation. This is in accordance with Texas Family Code §162.006 which gives prospective adoptive parents the authority to review such records. The purpose of this addition is to allow prospective adoptive parents access to information applicable to children they are considering adopting.

Finally, the rule also clarifies that a parent of a child who is not the subject of or the alleged perpetrator in the investigation but was a collateral witness during the investigation is entitled to the portion of the record related to their child. The reason for this change is to make language consistent between this item in the rule and the item being added for prospective adoptive parents. If a child witnessed an incident that was investigated for possible child abuse or neglect, the child’s parents should have access to otherwise confidential information specifically related to the child.

**Information that is not Releasable and Certain Exceptions**

Certain information contained in an abuse or neglect record is not releasable to anyone, even some of the individuals authorized to request the record under §745.8491. Currently, §745.8493 prohibits the release of the identity of the reporter. CCL is clarifying that any information that identifies the reporter is prohibited from release.

CCL is also amending the rule to prohibit the release of children’s identities, except to the parent or prospective adoptive parent, or an operation (or the SSCC) that was cited for a deficiency as a result of the investigation.

Even though certain information is not releasable, there are certain parties under specific situations that are also entitled to this “super” confidential information (e.g. DFPS staff, law enforcement, state legislators, or individuals with court orders).

Finally, DFPS may withhold information in its records if the agency staff in consultation with the Office of the General Counsel deems it necessary to ensure the safety of an individual.

## STATUTORY AUTHORITY AND STATUTES AFFECTED

The modification is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Department of Family and Protective Services Council shall study and make recommendations to the executive commissioner and the commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments also implement HRC §40.005 and §42.042.

COMMENTS AND RESPONSES

Child Care Licensing presented the proposed rules to the DFPS Council at their meeting on October 19, 2012. At the time of the meeting, one council member commented on one of the proposed rule changes and CCL informed the council member that the comment would be considered during the public comment period. Following the council meeting, Licensing notified the following stakeholders of the proposed rules and public comment period:

* Licensed child care centers
* Licensed, registered, and listed child care homes
* General residential operations
* School-Age and Before or After-School Programs
* Child Placing Agencies
* Independent Foster Homes
* Temporary Shelter Child Care Facility
* Small Employer Based Child Care Facility
* Subscribers to the DFPS Latest Child Care Regulations email notification list

Licensing provided notification to all providers by mailing a postcard in early November. Licensing also notified all stakeholders by email on November 17, 2012. The notification provided stakeholders with an email address, mailing address, and phone number to direct comments on the proposed rules.

The proposed rules were published in the Texas Register on November 16, 2012, and were open for comment until December 17, 2012*.* DFPS did not receive any comments regarding §745.8491. With regards to §745.8493, DFPS received one comment from a council member during the council meeting held on October 19, 2012.

COMMENTS AND RESPONSES

| **Section Affected and Original Proposal** | **Summary of Commenter’s Concern** | **Department Response and Rationale** |
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| §745.8491 | None | The department recommends adoption of this section with no changes. |
| §745.8493 (c) | DFPS received one comment related to this rule. The commenter’s noted concern was that the rule was written as though DFPS had absolute authority to decide to release certain items. | DFPS agrees with the commenter and is rewording the paragraph to clarify that CCL staff must consult with the Office of General Counsel before records are withheld. |

RECOMMENDATION

It is recommended that the Council recommend adoption of these rules, with or without changes, as they are attached to this memo.

SCHEDULE

| **Milestones** | **Dates** |
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| Proposed rules presented to the Council for recommendation to publish | October 19, 2012 |
| Approval to publish proposed rules received from HHSC | October 31, 2012 |
| Proposed rules published in the *Texas Register* | November 16, 2012 |
| Thirty-day comment period ends | December 17, 2012 |
| Rules presented to the Council for recommendation to adopt | January 18, 2013 |
| Projected date approval to adopt rules received from HHSC | January 30, 2013 |
| Projected date adopted rules published in the *Texas Register* | February 15, 2013 |
| Projected effective date | March 1, 2013 |

ATTACHMENTS

Attached is a copy of the proposed adopted rules, as recommended for submittal to the *Texas Register*.