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

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| TO: | **Chair and Members  Department of Family and Protective Services Council** | agencyseal |
| FROM: | **John J. Specia, Jr. Commissioner** |
| SUBJECT: | **Agenda Item 6g: Recommendation to adopt an emergency rule change in 40 TAC, Chapter 745, Licensing** |
| DATE: | **October 18, 2013** |

BACKGROUND AND PURPOSE

The Child Care Licensing (CCL) Division proposes an emergency rule to the Texas Administrative Code (TAC), Chapter 745, to implement House Bill (H.B.) 1648, which was enacted by the 83rd Legislature, Regular Session, at 40 TAC §745.8495.

H.B. 1648 amended the Human Resources Code (HRC) by adding §42.004, which makes photographs, audio or video recordings, depictions, or documentations of a child made by Child Care Licensing in the course of an inspection or investigation confidential and allows DFPS to release these items only as provided in state or federal law, or rules adopted by the Health and Human Services Executive Commissioner. HRC §42.004 became effective on September 1, 2013.

DFPS rules presently only address the documentation covered by this statute if the documentation was made during an abuse or neglect investigation. The rules do not cover such documentation made by CCL during a routine inspection. DFPS routinely must continue to share the types of records covered by HRC §42.004 with certain persons and entities (including law enforcement, child-care operations, and parents) as needed to ensure the protection of children or to afford due process to an operation found to have committed abuse or neglect or to have violated minimum standards. In order to continue this practice while meeting the requirements of HRC §42.004, DFPS must adopt an emergency rule authorizing the sharing of these records for specified purposes.

The Administrative Procedures Act (APA) provides that an emergency rule may be in effect for not longer than 120 days and may be renewed once for not longer than 60 days, during which time a rule with the same subject matter may be adopted under the non-emergency rulemaking provisions of the APA (See Government Code § 2001.034). Accordingly, in a separate rule packet, DFPS is simultaneously proposing a non-emergency rule that has the same content as the emergency rule, except that the non-emergency rule proposal will not include the transitional language contained in Subsection (c) of the emergency rule, Subsection (c) in the emergency rule is necessary to address a conflict in law that will exist between the adopted emergency rule at § 745.8495, and existing § 745.8493, which governs the release of audiotapes, videotapes, and other audio or visual depictions of a child gathered as part of an investigation of alleged abuse or neglect. Amendments to §745.8493 are also being proposed for amendment under a separate rule packet to remove the conflict between that rule and the content of both the emergency rule and the proposed non-emergency rule at § 745.8495.

DETAILED SECTION ANALYSIS AND DISPOSITION TABLE

| **Current Rule Sections** | **Proposed Action; New Rule Section** | **Summary Explanation of Proposed Action** |
| --- | --- | --- |
|  | Adoption of §745.8495 | This emergency rule specifies which persons or entities may review or have copies of confidential photographs, audio or video recordings, depictions, or documentations of a child in Licensing records. |

STATUTORY AUTHORITY AND STATUTES AFFECTED

The adoption is proposed under HRC §40.0505 and Government Code §531.0055, which provide that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DFPS; and HRC §40.021, which provides that the DFPS 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. Adoption of this rule as an emergency rule is authorized under Government Code § 2001.034, which allows use of the emergency rulemaking process in order to comply with state law.

The proposed rules implement § 42.004 of the Human Resources Code.

FISCAL IMPLICATIONS

(a) Fiscal Impact. For each of the first five years that the rule will be in effect there will not be costs or revenues to state or local government as a result of enforcing or administering this section.

(b) Public Costs and Benefits. For each of the first five years that the proposed sections will be in effect, the public benefit anticipated as a result of the rule changes would be compliance with the Human Resources Code. An economic cost is not anticipated.

(c) Impact on Business. There is no anticipated adverse impact on small, micro, and large businesses as a result of the proposed rule change.

(d) Local Employment Impact and Takings Statements. No local employment impact statement was required for these rules. The agency is not required to complete a takings impact assessment regarding the proposed sections.

(e) Technology Impact. An impact on technology is not anticipated as a result of the proposed rule change.

STAKEHOLDER INPUT

Stakeholder input will be obtained during the 30-day public comment period.

In response to the passage of H.B. 1648 (83rd Legislature), Child Care Licensing developed a workgroup to obtain input from providers, stakeholders, advocates, and field staff on the development of rule amendments to confidentiality rules in TAC 745, Subchapter K, Division 3. A workgroup meeting was held on June 24, 2013, where Child Care Licensing obtained input on rule development. The workgroup provided feedback on the draft rules during a meeting held on July 29, 2013.

RECOMMENDATION

It is recommended that the Council consider the proposed rule action, as discussed in this memorandum, and that the Council recommend proposal, with or without changes to the rules as they are attached to this memo.

ATTACHMENTS

Attached is a copy of the proposed change to the rule section as staff recommended for submittal to the *Texas Register*.