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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 MembersDepartment of Family and Protective Services Council** |
| FROM: | **John J. Specia, Jr., DFPS Commissioner** |
| SUBJECT: | **Agenda Item Recommendation to propose rule changes in 40 TAC Chapter 711, Subchapter O, relating to the Employee Misconduct Registry.** |
| DATE: | **April 22, 2016** |

## BACKGROUND AND PURPOSE

The Employee Misconduct Registry (EMR) is a publicly available, searchable database maintained by the Department of Aging and Disability Services pursuant to Chapter 253 of the Texas Health and Safety Code. The EMR is a list of persons who are not permitted to work in certain settings because they have been found to have committed reportable conduct. A finding of reportable conduct is a finding that an employee has been found to have committed certain, more serious abuse, neglect, or exploitation of a person who is elderly or a person with a disability.

Under authority in Chapter 48 of the Texas Human Resources Code, Subchapter I, DFPS is required to submit the names of certain employees whom Adult Protective Services (APS) has determined committed reportable conduct to DADS for placement on the EMR. If APS determines an employee has committed reportable conduct, the employee is offered a due process hearing prior to placement on the EMR, and if the finding is upheld, the employee is given an opportunity to file for judicial review of the finding.

The primary purpose of these rule changes is to update the terminology and process requirements regarding the due process rights of an employee prior to placement on the EMR. The changes make APS' requirements consistent with governing Texas law, the Administrative Procedures Act found in Chapter 2001 of the Texas Government Code. In addition they standardize terminology so that the employee's administrative remedies are more clearly explained. They also make modest updates to reflect changes enacted in the 84th Regular Session of the Texas legislature that expanded APS' investigative scope and jurisdiction in certain settings, including some settings in which employees are eligible for potential placement on the EMR. Those changes are the subject of a related packet being proposed in this Council meeting. However, given the focus of these rules on due process rights and procedures for EMR hearings, this rule proposal is being published as a separate packet. Finally, the changes streamline unnecessary provisions out of the subchapter so that it is easier to follow.

## DETAILED SECTION ANALYSIS AND DISPOSITION TABLE

| **Current Rule Sections** | **Proposed Action; New Rule Section** | **Summary Explanation of Proposed Action** |
| --- | --- | --- |
| §711.1402 | Amend | * Updates definitions for changes made in 84th R.S., including changes in SB 1880 and SB 760:
	+ Makes definition of "agency" consistent with law
	+ Updates terminology from "facility investigation" to "provider investigation" and clarifies meaning
	+ Adds definition of "individual receiving services"
	+ Renumbers and makes minor edits
* Removes definitions of terms not used in the subchapter
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| §711.1404 | Amend | * Updates title so it is comprehensive
* Modifies sections defining physical abuse, sexual abuse, emotional or verbal abuse, neglect, exploitation and financial exploitation for in-home and provider investigations by referring to the identical definitions already in rule. Specifically, for in-home investigations the operative terms are defined in 40 TAC Chapter 705, Subchapter A. For provider investigations the operative terms are defined in Subchapter A of Chapter 711. Rather than repeat the definitions in full, rules were modified to refer back to the definitions in other provisions of the rules.
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| § 711.1406 | Repeal; replace | * Modifies definitions for provider investigations as described above and combines into § 711.1404.
* Adds clarity regarding the meaning of the term "agency", the employees of which are potentially subject to the EMR.
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| § 711.1408 | Amend | Minor rewording for clarity and consistency. |
| § 711.1411 | Repeal | Deletes unnecessary provision; substance of the rule is also covered in § 711.1432 |
| §711.1413 | Amend | * Clarifies terminology regarding the "appeal" of a finding of reportable conduct. Terminology was used inconsistently to refer both to the EMR hearing as well as a subsequent request for judicial review.
* Adds a provision to the notice of finding letter for an employee who is found to have committed reportable conduct, requiring the employee to keep DFPS informed of the employee's current employment and residential contact information.
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| § 711.1414 |  | * Updates terminology; shortens and clarifies provision
* Adds requirement that the employee is responsible for providing DFPS with current telephone numbers in addition to the physical address the employee is already required to provide to DFPS
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| § 711.1415 | Amend | Updates terminology regarding EMR hearings for consistency |
| § 711.1417 | Amend | Updates terminology regarding EMR hearings for consistency |
| § 711.1427 | Amend | Adds requirement that the costs of transcribing testimony from an EMR hearing be paid by the employee seeking judicial review unless the employee establishes indigence. |
| § 711.1429 | Amend | Updates terminology and cross-reference |
| § 711.1431 | Amends | Makes requirements for requesting judicial review of a finding of reportable conduct consistent with the Texas Administrative Procedures Act. Specifically:* Makes the filing of a timely motion for rehearing in accordance with Subchapters F and G of Government Code Chapter 2001 a prerequisite to judicial review
* Updates the guidance regarding seeking judicial review by referring to the operative law on point, Subchapters F and G of Government Code Chapter 2001
* Clarifies the time frame for reporting a finding to the EMR after an order becomes final
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| § 711.1432 | Amends | Provides clarity regarding the exhaustion of administrative remedies and DFPS' actions once those rights have been exhausted. |
| § 711.1434 | Amends | Updates terminology. |

## 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.

These changes implement Human Resources Code §§48.401-48.408.

## FISCAL IMPLICATIONS

(a) Fiscal Impact. For each of the first five years that the rules 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 change will be that employees who are potentially subject to the EMR will have a better understanding of the process for disputing a finding made against them that is eligible for the EMR. In addition, employers will have a greater understanding of the process that may lead to an employee's placement on the EMR*.* There is a very small economic cost anticipated to persons who are required to comply with the proposed sections. The amendment to §711.1427 conforms the rules to general civil practice by requiring a petitioner who is seeking judicial review to pay the costs of transcribing the hearing and preparing the record, unless the petitioner is indigent. There are a relatively small number of EMR cases filed by petitioners in district court each year (with 7 annually being a high number). Given the wide variety in transcription costs based on variations in hearing length and testimony, specific costs were not estimated at this time.

(c) Impact on Business. There is no anticipated adverse impact on small or micro businesses as a result of the proposed rule change because the proposed rule change should not affect the cost of doing business; does not impose new requirements on any business; and does not require the purchase of any new equipment or any increased staff time in order to comply.

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

(e) Technology Impact. There is no anticipated impact on technology as a result of the proposed rule change.

## STAKEHOLDER INPUT

The Office of the Attorney General provided input regarding the changes. Additional stakeholder input will be gathered during the public comment period.

## 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*.