

## **CONSENT OR COERCION? HOW MANDATORY OPEN RECORDS HARM ADOPTION**

The issue of “open records” has been hotly debated for decades and the National Council For Adoption (NCFA) has been active in opposing the unilateral and coercive nature of those proposals. NCFA does not oppose reunions or the exchange of identifying information between mutually consenting parties to adoption. What we oppose is the law empowering one party to adoption to force himself or herself on another.

The views of adopted persons, birthparents, and adoptive parents regarding contact and the release of identifying information vary greatly. Many birthmothers, for example, would welcome contact, but many others who have been promised confidentiality would be deeply upset by it. A small minority of adopted persons feel a strong need and even absolute right to this connection. But most adopted persons, though perhaps curious, do not search, and they exhibit little interest in any other family connection beside their adoptive family. One can empathize, especially an adoptive parent such as the author, with any perspective along the spectrum that a person who was adopted or a birthparent might feel about such contacts or exchanges. But considering the wide-ranging and deeply personal views on adoption openness, a mandatory, one-size-fits-all policy is inappropriate. As elaborated in this brief, the decent solution is one based on mutual consent.

### **Privacy Rights in Adoption**

The right to maintain or waive one’s privacy in adoption is essential to the human rights and personal dignity of adopted persons, birthparents, and adoptive parents. Adoption policy and practice should not empower one party to adoption to receive identifying information or unilaterally impose contacts without the consent of another party. Birthparents and adult adopted persons who desire to have contact should be able to do so, when *both* agree. Otherwise, both should be able to control the release of their identifying information and whether and when contacts are to occur.

Search and reunion advocacy is commonplace in the media, but views among birthparents, adopted persons, and adoptive parents regarding confidentiality and openness in adoption are actually as diverse and personal as they can be. The only just way to reconcile these varying views is through mutual consent, not unilateral coercion. By eliminating even the option of confidentiality in adoption, “open records” laws harm the institution of adoption and unjustly and unnecessarily disrupt the lives of innocent people involved in adoption. If enacted nationally, they would impose a one-size-fits-all, mandatory-openness policy on all adoptions, past, present, and future, even for the many hundreds of thousands of birthparents who were promised confidentiality.

No other counseling relationship between client and professional service provider is subject to state violation of client privacy. If the state may remove a professionally guaranteed right to confidentiality in adoption, what is to prevent the state from attempting to remove that right in relationships with doctors, lawyers, clergy, and others, as well? Eliminating privacy in adoption resulted in the elimination of infant adoption as a viable social institution in Great Britain.<sup>1</sup> It would be tragic and devastating to the interests of children to see that outcome in America. But the same result would likely occur here if mandatory openness became the law of the land, to the detriment of children, birthparents, and families. The institution of infant adoption has already decreased to

startlingly low numbers in the U.S. – 22,291 in 2002, as compared with 1,365,966 non-marital live births and 1,313,030 abortions (in 2000).<sup>2</sup>

### **The Large Majority of States’ Rejection of Mandatory Openness**

Very few states have enacted the mandatory-openness policy, and those enactments are the aberration, not the trend. Despite decades of persistent, mandatory-openness advocacy, there are still 43 states that allow birthparents to control whether their identifying information will be released, through a mutual consent registry (NCFA’s recommended policy) a confidential intermediary, and/or a contact veto (see discussion of these options later in this article). Since the “open-records” movement began some 30 years ago, only five states have adopted this harmful policy, in addition to Alaska and Kansas, which had mandatory open records from the outset. In recent years, since 2001, at least 15 states have considered more than 30 pieces of mandatory open-records legislation. Only one state, New Hampshire, approved the measure, and then only by the slimmest of margins, 12-11 in the Senate.

### **The Vocal Minority and Silent Majority**

Unfortunately, the loudest voices legislatures and the public generally hear regarding this issue belong to a small minority of adopted persons who demand the absolute right to identify and even to contact their birthparents, without birthparents’ consent. A small but nationally well-organized group of activists seeks to eliminate confidentiality in adoption, or “secrecy and shame,” as they attempt to caricature it. This vocal minority has little to lose simply by persevering year after year in their efforts to eliminate confidentiality in adoption. That is not the case for birthparents who desire their privacy, however. By standing up for their rights, they lose them in the process.

It is vital for legislators who conduct hearings on this issue to recognize that they will generally hear more from proponents of “open records” than from opponents. Birthparents who prefer privacy cannot discuss their views publicly without sacrificing the very privacy they desire to protect. They must either remain mute while their rights are being taken away or lose their confidentiality in the act of defending it. If they could speak, there would be many such witnesses in those hearings, with very sympathetic and emotional testimonies.

On the other hand, many adopted persons are curious about their birthparents, but most do not search. Whether they search or not, most adopted persons know who their parents are, the ones who raised them, and they are not interested in having an absolute right to force themselves on their birthparents. But advocating for *not* having a right is not something that motivates people to testify in hearings, or contact their legislators. Unlike the vocal minority, the silent majority of adopted persons have no real incentive to engage the debate.

### **The Harms of Mandatory Open Records**

There are several ways that mandatory openness harms adoption, birthparents, children, and families:

- **First, mandatory openness violates birthparents’ basic human right to privacy.** “Open-records” policies completely eliminate birthparents’ right to choose a confidential adoption, both retroactively and prospectively. To open records retroactively without the approval of a birthmother who was promised privacy is a particularly egregious violation of trust and common decency. For the typical birthmother, making an adoption plan for her child is a supremely loving act, committed in the best interests of her child. The law should honor birthmothers for this act of love, not punish them by stripping them of their basic human right to privacy.

Under mandatory-openness policies, no future birthmother may choose a confidential adoption, no matter what the circumstances of pregnancy or birth, even in the cases of rape or incest. Consider this true story: One birthmother, who placed a child conceived in rape, in preparing to meet with the adult adopted child, was asked by the child to reunite with the father, too! Fortunately, because her identity had not yet been revealed, in accordance with the guidelines of the mutual consent registry in her state, she was able to withdraw from the situation and decline the reunion. A mandatory-openness policy would not have allowed her to avoid a traumatic and even dangerous situation.

Policymakers, adoption professionals, and the public should recognize that there are any number of legitimate and understandable reasons that birthparents may desire confidentiality – perhaps the birthparent does not want to upset his or her spouse, family, and friends with a never shared revelation; perhaps the birthparent is psychologically or emotionally unable or unready to handle the stress of renewed contact; perhaps the birthmother may be interested in contact some day, but needs to control the timing; perhaps the birthmother does not want to relive the abusive relationship, rape, or incest that caused the pregnancy, or fears possible contact with the birthfather; or perhaps the birthparent simply believes that the healthiest approach for all parties is not to have an ongoing relationship. It is oppressive to impose a one-size-fits-all, mandatory-openness policy, instead of respecting birthparents’ loving discernment and their right to privacy.

All states with consent-based openness policies appropriately make exceptions allowing the release of identifying information to adult adopted persons, or parents of minor adopted persons, at a minimum with a legal determination of “good-cause.” Thus, unlike mandatory-openness advocates’ demands for unconditional access to identifying information, birthparents are not provided an absolute right to privacy. Nor does NCFA advocate an absolute right. However, with limited exceptions, such as a legal determination of “good cause,” as minimally allowed in all states with consent-based openness policies, the birthparent should have the right to control the release of her or his identifying information and whether and when contact is to occur.

- **Second, mandatory openness increases the number of unwanted, unilaterally imposed contacts between adopted persons and birthparents.** Providing adult adopted persons identifying birthparent information without birthparents’ knowledge or consent increases the number of unwanted, unilaterally imposed contacts. When such a law is passed in a state, many thousands of birthparents, around the state, country, and world, become vulnerable, especially because very few of them are even aware that their privacy has been eliminated. Even if they are aware of the new law, they are powerless to prevent unwanted contacts or control the timing of them. Unwanted reunions between adult adopted persons and birthparents are often highly

disruptive and even traumatic for everyone involved. Even when adopted persons and birthparents mutually consent to contact, their satisfaction with reunions and ongoing relationships is quite unpredictable, despite the rosy scenarios often portrayed in the media.

Mandatory-openness advocates frequently offer a “contact preference form” as an attempt to address concerns about unwanted contacts. However, such forms are only indications of birthparent preferences and have no legally binding effect. They still allow the release of birthparents’ identifying information without their consent, which is a violation of privacy in and of itself. And they still leave birthparents vulnerable to unilaterally imposed contacts, and the fear thereof, even if such contacts never occur.

Another slightly better, but still unsatisfactory compromise that is sometimes offered is the “contact veto,” which allows birthparents to take an affirmative step legally prohibiting contact. Of course, most birthparents would be unaware that the law had been changed and that they must exercise their contact veto in order to maintain their privacy. This policy has the principle backwards: Persons should not be required to take an affirmative step to *maintain* their privacy; they should be required to take an affirmative step to *waive* it. Furthermore, this policy still violates privacy by releasing identifying information without consent. And once an unwanted contact is made and birthparents’ privacy is violated, what recourse do they really have? How many birthmothers are going to press charges against the child they lovingly placed for adoption?

- **Third, mandatory openness undermines the strength of the adoptive family.** A chief reason adoption has been so successful is that society and law have respected the adoptive family as the child’s true and permanent family. Adoption is not “long-term foster care,” until the child grows up and can reunite with the “real” family. But by empowering one side to force herself or himself on the other, mandatory openness establishes the state as a reunion advocate, rather than the neutral party it should be. It establishes as the legal norm and the cultural expectation that adopted persons and their birthparents will, and should, “reunite” when the child reaches the age of majority. Such a policy not only promotes emotional and traumatic experiences in families, it sends the corrosive message that adoptive families are somehow inadequate to meet the psychological needs of their adopted members.

This message attacks a very foundation of adoption, that the adoptive family is the child’s true and permanent family. Adoptive parenting has provided untold social and familial benefits to children throughout the years. Law and society must continue to respect the adoptive family as the adopted person’s true and permanent family, in order for those benefits to continue.

- **Fourth, mandatory openness reduces the confidential options available to women with unplanned pregnancies and causes some women who would otherwise choose adoption to choose abortion.** There are significant numbers of women with unplanned pregnancies, who are concerned about privacy in making their decisions regarding their pregnancies. Clearly, some number of these women, who would otherwise choose adoption, would choose abortion if they could not choose adoption with the assurance of confidentiality. What that number would be is impossible to tell, but what does it need to be? The loss of human potential from even one abortion that would have been an adoption is unknowable. As reported in the statistical section of *Adoption Factbook IV*, the ratio of infant adoptions to abortions in America is already

extremely low – only 17 domestic infant adoptions for every 1,000 abortions.<sup>3</sup> As stated by the late Jeremiah Gutman, who was a director of the American Civil Liberties Union (ACLU) and chair of the ACLU’s Privacy Committee, a woman facing an unplanned pregnancy could maintain her privacy *only* if she had an abortion.<sup>4</sup> Should the law grant a woman with an unplanned pregnancy a right to a confidential abortion, but not to a confidential adoption?

Mandatory-openness advocates point to reductions in abortions in selected states to argue that “open-records” policies actually increase the number of adoptions. This assertion defies common sense. Why would more women choose adoption because confidential adoption has been removed from them as an option? The fact is that abortions have gone down in most states in recent years, whatever their policies on adoption records, and there are far more powerful factors influencing that trend than adoption-openness policies. Unlike the mandatory-openness advocates’ argument, our point here is not a “macro-economic” assertion, i.e., that mandatory open records increase the overall number of abortions in a state. Rather, the point is a “micro-economic” observation about the psychology of the decision. Some unknowable number of women with unplanned pregnancies, who care about their privacy, will choose a confidential abortion, when the only other confidential option, adoption, is removed. The mandatory-openness policy’s arbitrary limitation of confidential options is unjust to women with unplanned pregnancies who care about privacy, whatever their numbers.

- **Fifth, mandatory openness reduces the number of adoptions and increases the number of children in foster care.** Eliminating privacy in adoption would mean that women with unplanned, out-of-wedlock births, who would only choose adoption if it was confidential, would have no choice but to single-parent. Social science data clearly reveal that the more single parents there are, the more children languish in foster care, with greatly increased costs to the child, family, society, and taxpayer as a result. Forcing women to parent when they are not ready to do so leads to more children in foster care, as evidenced by the large increases in the foster care rolls that have occurred, as the number of infant adoptions dramatically declined over the last 30 years.
- **Sixth, mandatory openness perpetuates the myth that adopted persons face debilitating identity problems that can only be resolved by knowing and having contact with their biological roots.** The erroneous assumption of mandatory-openness advocates is the false and demeaning notion that in order to be psychologically healthy, all adopted persons must fulfill a deep-seated need to have identifying information about, and contact with, their biological parents. The truth is that the vast majority of persons adopted at a young age accept their adoption readily, and grow up to be successful, happy, stable adults at the same rate as people raised in their biological families. While many adopted persons indicate a curiosity about their biological parents, few profess anything approaching a need for identifying information or contact, and fewer still would favor having an absolute right to impose themselves on birthparents.<sup>5</sup>
- **Seventh, mandatory openness adds nothing to the adopted person’s ability to obtain medical information.** State laws already allow for adopted persons to request medical or genetic information from birthparents without sacrificing confidentiality – at a minimum, with a showing of “good cause.” NCFCA supports the principle that the law should provide an efficient process whereby adult adopted persons, and the parents of minor adopted children, can

efficiently request medical information from birthparents. But these requests can be fulfilled confidentially, and it is the common practice to do so. Birthparents, agencies, attorneys, and judges alike willingly facilitate this process. In addition, the increasing availability of genetic testing is making the issue of medical records moot. One can obtain more information about one's genetic predispositions from such tests than from medical histories of biological parents.

### **Search and Consent through Confidential Intermediaries: Better, but Still Seriously Flawed**

Approximately half the states provide some sort of confidential intermediary system, whereby a party to adoption may direct the state to approach another party to the adoption and request identifying information and contact, on the searching party's behalf. While this policy technically allows the subject of the search to control the release of her or his identifying information, it violates privacy and disrespects the principle of mutual consent in several ways. Search and consent through confidential intermediaries:

- **Violates the privacy of the subject of the search:** The act of opening the confidential records to the intermediary is itself a violation of the search subject's privacy. Such policies may violate HIPAA, and other confidentiality laws and professional standards, and they risk the possibility that the intermediary already knows the subject of the search. Particularly at a time when policy makers are increasingly concerned about citizens' privacy rights, the confidential intermediary system is highly intrusive into very personal matters.
- **Requires subjects of the search to revisit a difficult question that was previously decided:** Birthparents and adult adopted persons are well aware of their options to waive or maintain their privacy. The very approach of a birthmother, for example, by an intermediary puts pressure on her to take an action that she already decided against, and she already knows she can rescind in most states by notifying the mutual consent registry. Thus, by approaching parties to adoption under the search-and-consent policy, the state's intermediary is acting more as a reunion advocate than a simple conduit of information. Moreover, some "intermediaries" quite willfully pressure subjects of searches to cooperate, even when the subjects have clearly indicated their desire not to do so, as was adopted person Carol Sandusky's experience. (See her congressional testimony at <http://waysandmeans.house.gov/legacy/humres/105cong/6-11-98/6-11sand.htm>.)
- **Creates a "lose-lose" option for adopted persons and birthparents who desire privacy, and leads to unsatisfactory reunions:** The person who desires privacy, when approached by the intermediary, has the choice of either agreeing to contact he or she does not wish to have, or risking being perceived as rejecting a special person he or she does not wish to hurt. For example, the approach by the intermediary puts the birthmother who desires privacy in a "lose-lose" situation: If she says "yes," she goes along against her best wishes and judgment; if she says "no," she fears sending a message of rejection to a person she loves. Already, one of her greatest fears is that her child she placed for adoption interprets her adoption decision as rejection, even though she sees it as loving and responsible. Consenting to undesired contact under pressure or out of guilt results in unsatisfactory and traumatic reunions.
- **Causes emotional trauma through accidental interception of confidential-intermediary messages by persons previously unaware of the adoption:** Many birthmothers and birthfathers have not disclosed past pregnancies and adoptions to family members or friends,

perhaps waiting until an appropriate time. In some cases with confidential intermediaries, loved ones who know nothing about the adoption inadvertently intercept the contact from the intermediary. Even when the intermediary is careful about the content of the message that is left, suspicion can be aroused and exposure can occur, leading to emotional trauma in those relationships.

- **Undermines the adoptive family and violates the privacy of adopted persons by allowing birthparents to initiate contact with adopted persons:** A fundamental principle of adoption is that when birthparents make an adoption plan, they transfer all parental rights and responsibilities to the adoptive parents, in the best interests of the child. The adopted person becomes the adoptive parents' child, and the adoptive family becomes the child's true and permanent family. Yet many states with search-and-consent systems allow birthparents to intrude upon the adopted person and the adoptive family when the child reaches the tender age of 18. Such a policy threatens the family's cohesion and the adopted person's identity at a sensitive time in the child's life. If the adopted person desires birthparent information or contact, he or she can seek it through the mutual consent registry.
- **Violates privacy of parties to adoption by granting search-and-consent privileges for and to birthrelatives:** Some states allow adult adopted persons to search for wide-ranging birthrelatives, including birthsiblings, grandparents, even aunts and uncles. Such searches jeopardize birthparent privacy decisions. For example, revealing to an adopted person the identity of a birth sibling who is living with the adopted person's birthparent would almost certainly lead to exposure of the birthparent's identity. Some states go even further by allowing wide-ranging birthrelatives to search for adopted persons placed by their family member. This policy extends highly intrusive privileges to persons only secondarily involved in the adoption, against the wishes of the primary parties to the adoption, and is fraught with dangers to family integrity. Imagine the family strife in the case of a birthgrandparent, for example, going against the wishes of the birthmother in having a reunion with the adopted child.

The confidential intermediary system is a considerable improvement over the mandatory open records policy, because, properly implemented, it allows parties to adoption to control the release of their identifying information beyond the confidential intermediary. However, it has significant flaws as noted above, and offers no advantage over NCFA's recommended policy.

### **A Fair and Effective Policy – the Mutual Consent Registry**

NCFA advocates the mutual consent registry as the most equitable policy for handling the issue of openness and privacy in adoption. More than 40 states allow birthparents and adult adopted persons, who desire to exchange identifying information and/or have contact, to register with the state their interest in doing so, in which case the state informs both parties and facilitates the process. By allowing birthparents and adult adopted persons to permit or prohibit the release of their identity, the registries facilitate mutually consensual contact, while enabling the parties to safeguard their privacy, if they so choose.<sup>6</sup> Some states allow birthparents to authorize at the time of placement, as part of the adoption approval process, the release or non-release of their identifying

information to the adult adopted child upon request. Such policies respect the principle of mutual consent, so long as the birthparent may change his or her designation at any time.

A “match” in a mutual consent registry occurs when both an adult adopted person and a birthparent register with the state their interest in exchanging identifying information and/or contact. Mandatory-openness advocates often attempt to justify their opposition to mutual consent registries by stating that the low frequency of matches is evidence of the policy’s ineffectiveness. But any party to adoption interested in contact learns very quickly of the existence of the registry. If an adopted person or birthparent chooses not to register at that point, the logical explanation is that the party is simply not interested in having contact or sharing identifying information, not that the policy “doesn’t work.” The policy allows the parties to choose. If they do not choose the way mandatory-openness advocates think they ought, that does not mean there is something wrong with the policy. People who choose not to register should be allowed to maintain their privacy.

### Conclusion

Elsewhere in *Adoption Factbook IV*, preeminent researchers in the study of openness in adoptive placements conclude that a “one-size-fits-all approach” regarding “the desirability and undesirability of fully disclosed or confidential adoptions...is not warranted....[T]he development of adoptive identity is quite varied, depending on individuals, families, and aspects of the kinship network....But...this variation does not appear to be significantly dependent on level of openness.” For this reason, NCFA also supports the application of the mutual consent principle to decisions regarding openness in domestic adoptive placements of infants – that is, mutual consent between birthparents and adoptive parents.

As this brief argues regarding openness in adoption records, mutual consent seems to be the decent and just option for adoptive placements, as well: Let the adoptive parents and birthparents agree to the level of placement openness that seems right to them. Hopefully, the above finding from Professors Grotevant, Perry, and McRoy will put to rest the “one-size-fits-all” approach taken by many openness advocates. After decades of contentious debate, we invite and urge the adoption community to unite around the humane principle of mutual consent regarding the issue of openness in adoption, both for records and placements.

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<sup>1</sup> “Removing Privacy and Its Impact on Adoption: An Analysis of Data from England and Wales as Compared with America,” by William Pierce, *Adoption Factbook III*, 1999, pages 209-212.

<sup>2</sup> “National Adoption Data,” *Adoption Factbook IV*.

<sup>3</sup> “National Adoption Data,” *Adoption Factbook IV*.

<sup>4</sup> “Privacy and Adoption,” by Jeremiah Gutman, *Adoption Factbook III*, National Council For Adoption, 1999, page 197.

<sup>5</sup> *Growing Up Adopted: A Portrait of Adolescents and Their Families*, by Peter L. Benson, Ph.D., Anu R. Sharma, Ph.D., L.P., and Eugene Roehlkepartain, Search Institute, Minneapolis, MN, 1994.

<sup>6</sup> Sixteen states offer both a mutual consent registry and search and consent through confidential intermediaries.