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A Deeper Conversation on Information Sharing in Adoption: Compromise Offers Promise and Keeps Promises

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Since 1980, the National Council For Adoption (NCFCA) has worked to strengthen the culture of adoption in the U.S. and around the world. American society has come to recognize and honor adoption as a means of serving the best interests of children, birthparents, adoptive families, and society at large. While there is always room for improvement, it speaks positively of Americans' views and knowledge of adoption that adoption practices have become increasingly open and less secretive over time, minimizing the inappropriate connotation that adoption is ever, in any way, a shameful process.¹

A society that openly accepts and respects the positive practice of adoption allows all individuals who are part of the "adoption triad" – adopted individuals, birthparents, and adoptive parents – to feel accepted and validated if and when they choose to share their adoption stories with others, or when they decide to seek out more information about their own adoption stories. It is equally important that all members of the adoption triad and the public at large be equally accepting in those less frequent cases when an adopted individual or birthparent prefers to keep all or part of his adoption story confidential. A healthy culture of adoption requires that each individual participant has the right to choose which

¹For more information about the evolution of birthparent counseling, see: Johnson, C. and Faasse, K., "Birthparent Counseling in Policy and Practice," *Adoption Advocate* No. 45 (March 2012). Available at: www.adoptioncouncil.org/images/stories/documents/nca_adoption_advocate_no45.pdf



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parts of her adoption story to share, whom to share it with, and at what time. It should also be her decision whether and when to seek previously undisclosed details about her adoption. Similarly, if confidentiality has been promised and remains desirable to any adopted individual or birthparent, it should be within their power to maintain it.

The debate over who should have access to original birth and adoption records, and when they should have it, is many-layered and often fraught with emotion on all sides. This article examines ways in which state laws, the adoption community, and the public can best honor the wishes of those seeking information and/or contact while also maintaining the right to privacy for those who desire it. If we expand this often contentious conversation – taking a less narrow and divisive approach to the issue of sharing information and reuniting birthparents and adoptees – it is possible to pursue solutions that benefit everyone.

History of Birth Records and Information Sharing

Adoption practices have evolved significantly over time. Historically, there was a period in this country when adoption was unfairly viewed as something best kept secret. Unintended pregnancies and parenting outside of marriage both carried a far greater stigma than they do today, and infertility was also viewed less sympathetically. As a result, birthparents, adoptive parents, and adopted individuals often faced public censure or judgment, and adoption was viewed as a last resort rather than a positive option for children and families. In the vast majority of these past cases, despite facing an inappropriate and unfair cultural stigma, members of the adoption triad most likely had good intentions – birthparents choosing the option of adoption frequently did so in order to secure their child's future, and many adoptive parents seeking to build a family provided safe, loving environments for their children. While adoption practice and counseling has by necessity changed a great deal – and for the better – it is reasonable to believe that, on the whole, adoption professionals in the past sought to serve the interests of children and families as best they could.

Early 20th-century adoption practices often sought to maintain the confidentiality of birthparents, due to both the stigma attached to adoption and the belief of many adoption practitioners that confidentiality would encourage attachment between children and their adoptive families. Unfortunately, practices promoting confidentiality also tended to perpetuate the perception of adoption as something shameful. Both practice and laws built a system that established confidentiality as the norm in adoption. In 1916, New York enacted the first law in the U.S. sealing adoption records from the public, and in 1917, Minnesota enacted a law sealing records from inspection by adult adoptees and birthparents

as well as the general public.² By the 1950s, the vast majority of states had sealed adoption records, and most had already implemented a system that created new birth certificates listing only a child's adoptive parents.³ These birth certificates provided legal documents of parentage to adoptive families while concealing the identities of birthparents and adopted individuals from one another and from the public.

Today adoption is far more widely accepted and celebrated as the positive outcome it is for birthparents, children, and adoptive families. Over time, this positive shift in cultural perception has led to more open adoption practices in a majority of U.S. cases. However, confidentiality (or more limited openness options that allow for the possibility of anonymity) remains important to a small number of participants, including some prospective birthparents.⁴ A recent survey questioned 100 private agencies from across the United States about the levels of openness in the adoptions they had facilitated during a two-year period; of the 4,400 adoptions facilitated by reporting adoption service providers, 5% (approximately 220) were confidential adoptions.⁵ If this same percentage were analogously applied to the approximately 18,078 adoptions facilitated annually nationwide,⁶ we would see that approximately 904 adoption triads choose to participate in a confidential adoption each year.

While a clear majority of adoptions today contain some level of openness, and NCFA believes that this is a good trend, a choice made in one out of every twenty adoptions should not be discounted. If 5% of adoptions today are confidential upon the mutual agreement of adoption parties, then it is probable that a much higher percentage of individuals involved in past adoptions may well have desired confidentiality in part because open adoptions were less widely accepted.

Birth Records and Information Sharing Today

Given that a great and increasing majority of domestic adoptions today are open to some degree, and that best practice now requires birthparents to share, at minimum, medical and social background information with the adoptive family and adopted individual, the debate over birth records and information sharing has and will continue to subside. In domestic adoptions today, adoption professionals recommend that contact

² Hollinger, Joan H., 003-13 Adoption Law and Practice § 13.01 [1] [b] (2006).

³ Deloney, Wayne, "Unsealing Adoption Records: The Right to Privacy Versus the Right of Adult Adoptees to Find Their Birthparents," *Whittier Journal of Child and Family Advocacy* (2007).

⁴ For one example, see: Lewis, Courtney, "A Birthmother's Perspective," *Adoption Factbook IV* (2007). The author ultimately chose open adoption, but said that she could not have chosen adoption at all if confidentiality had not been an available option. Available at: www.adoptioncouncil.org/images/stories/documents/459-460_PM0000_CH42.pdf

⁵ Siegel, D. and Smith, S., "Openness in Adoption: From Secrecy and Stigma to Knowledge and Connections." Available at: www.adoptioninstitute.org/publications/2012_03_OpennessInAdoption.pdf

⁶ Placek, P., National Adoption Data Assembled by the National Council For Adoption, *Adoption Factbook V* (2011)

preferences be determined prospectively – at the time of an adoptive placement – while allowing for some future flexibility, as an individual’s preferences may change over time.⁷

Although total confidentiality in adoption has become far less common, some participants still prefer confidential adoption or a lesser degree of openness, which may include sharing only minimal information or communicating on very limited terms. Still, the trend towards openness is clear. In a recent study measuring levels of openness, birthparents and adoptive parents were interviewed and asked to report on the level of openness in their adoptions. The spectrum included a continuum of openness with seven openness descriptors. Adoptions described as “very closed” and “closed” were reported at 6% or less amongst the groups of reporting parents, showing that the vast majority of adoptions today have some level of openness.⁸

NCFA’s Position

Over time, as open and semi-open adoptions have become the norm, there has also been an increasing amount of interest in exchanging information or facilitating reunions between birthparents and adopted individuals. Likewise, over time, NCFA’s position has come to encompass the need for accommodation and compromise on the issues of information exchange, search, and reunion.

Absolutist advocates for open records claim that NCFA has always been and continues to be anti-reunion and anti-information sharing. This is untrue. NCFA has never opposed adoption reunions or information sharing, and in fact both accepts and encourages these outcomes for willing parties. Since our founding in 1980, NCFA has counted amongst our membership many adoption service providers that facilitate open adoption. We fully support reunions and the exchange of identifying information between members of the adoption triad when the parties themselves wish for such an exchange.

On rare occasions, a party to adoption may feel compelled to seek and later maintain his or her confidentiality. In these instances, NCFA encourages the keeping of past promises, while still satisfying those seeking information to the greatest extent possible and acceptable to the other party (or parties). This position of compromise is one NCFA has advocated throughout its history. NCFA’s first president, William Pierce, was once quoted as saying,

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⁷For more information on contact preferences and one birthmother’s recommendations on how to establish communication in an open adoption, see: Hutton, Amy, “My Perspective on Open Adoption and Recommendations for Birthparents,” *Adoption Advocate* No. 41 (November 2011). Available at: www.adoptioncouncil.org/images/stories/documents/ncfa_adoption_advocate_no41.pdf

⁸Martin, D., Leve, D., Natsuaki, M., Neiderhiser, J., and Ge, X., “Toward a Greater Understanding of Openness: A Report from the Early Growth and Development Study,” *Adoption Factbook IV* (2007).

“I don’t think open records are fair, but I don’t think closed records are fair either.”⁹ As former NCFCA president Thomas Atwood later explained, “NCFCA 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.”¹⁰

What is the law today?

Laws regarding access to birth records vary from state to state. For a full review of these state laws, the Child Welfare Information Gateway provides a useful summary in their *Access to Adoption Records: Summary of State Laws*.¹¹ Specific state laws can also be retrieved by using the *State Statutes Search* available at www.childwelfare.gov¹² or by reviewing the state’s adoption code. A brief review of the major types of policies these laws put into place regarding access to birth records is as follows:

Open Records: Original birth records of adoptees are available to them upon request once they reach the age of majority (18 or 21, depending on the state). Presently, only six states currently have open records laws.

Nondisclosure Veto: A document filed by one party to adoption expressing their right to refuse that their identifying information be disclosed to a searching party.

Contact Veto: A document filed by one party to adoption expressing their right to refuse to be contacted. At times, this veto may extend to varying degrees of relatives as well.

Bifurcated System: A state law by which different disclosure protocols are in place before and after a dividing date in time. For example a state may have a confidential intermediary system before a certain year, and allow for records to be accessed by adopted individuals at the age of majority after a specific date unless a nondisclosure veto has been filed.

Confidential Intermediary System (sometimes known as an “active registry”): A system by which a party to an adoption requests information or contact with another party or parties through an intermediary, an individual or entity who facilitates communication. The intermediary then contacts the other party or parties in order to determine whether they are open to contact or the sharing of information. Information is then relayed to the requesting party to the extent agreed upon by the non-requesting party.

⁹ Dzik, Eileen, “Digging for Their Roots,” *The Washington Post*, August 8, 1989.

¹⁰ Atwood, Thomas C., “Consent or Coercion? How Mandatory Open Records Harm Adoption,” *Adoption Factbook IV* (2007).

¹¹ Child Welfare Information Gateway, *Access to Adoption Records: Summary of State Laws*, 2009. Available at: www.childwelfare.gov/systemwide/laws_policies/statutes/infoaccessap.cfm

¹² Child Welfare Information Gateway, *State Statutes Search*. Available at: www.childwelfare.gov/systemwide/laws_policies/state/

Mutual Consent Registry (sometimes known as a “passive registry”):

A system allowing individuals involved in an adoption to register, stating their willingness to exchange information or make contact with another party to their adoption (or, in some cases, stating their wish not to be contacted).

Court Order Only: In every state, a protocol is in place where original birth certificates or information, including medical or identifying information, can be requested if they can meet the state’s required standard of proof. Typically the standard is a high one, requiring an emergent need such as a severe illness that might be able to be better treated with knowledge of medical history, not simply a desire to know the information.

Reframing the Debate: NCFA’s Current Position on Information Sharing and Reunion

“All or nothing” advocacy fails.

It is unfortunate that many advocates for open records have chosen to frame the debate on records, information sharing, and reunion so narrowly. For most, the only acceptable option is for the original birth record and adoption decree to be made available to adoptees upon request once they reach the age of majority. One group goes so far as to explain that their organization “does not support mandated mutual consent registries or intermediary systems in place of unconditional open records, nor any other system that is less than access on demand to the adult adoptee, without condition, and without qualification.”¹³ This uncompromising “all or nothing” position on the issue has, more often than not, proven too radical for state legislatures.

Since the 1970s, mandatory open records advocates have promoted the opening of birth records in nearly every state. This approach has gained them little ground. Only six states currently provide birth records to adoptees upon request at the age of majority. In all other states, birth records are only available with some “condition” or “qualification” that many open records advocates find unacceptable.

It’s about individual people, not about group labels.

Framing the issue of information sharing simply as the right of adoptees to have their original birth certificates, or the right of birthparents to maintain their confidentiality, denies the variety and uniqueness of adopted individuals and birthparents. It also fails to recognize that some

¹³ Bastard Nation Mission Statement. Available at: www.bastards.org/whoweare/mission1.htm

adopted individuals and birthparents may already have all the information they need, and may not want to be sought out or contacted. It also fails to protect adopted individuals who may not want their information shared with other parties, or may wish to release it only under certain conditions – to one birthparent but not to both, for example.

The advocates of an “all or nothing” approach to open records also make the argument that, since the majority of birthparents are open to contact, that means it is always appropriate. Unfortunately, this argument leaves out the quieter but still important voices of those who might prefer confidentiality and no contact. One study often cited as showing that the majority of birthparents (88.5%) are open to contact reveals an important caveat upon further analysis: 75% of those birthmothers who supported the release of identifying information also wanted “consent of the birth mother as [a] condition for permitting adoptees access to this information.” In other words, three out of every four birthmothers who were open to allowing access *also* believed that any access should be based on mutual consent.¹⁴

An insistence on open records without mutual consent fails to recognize that individual birthparents’ opinions exist on a spectrum, and not on one of two extreme poles (wanting contact vs. wanting complete confidentiality). If given a choice, a birthmother might desire an ongoing relationship with the child she placed for adoption, or the exchange of anonymous letters, or the provision of medical and social background information only, or some other form of information exchange or contact that she has individually chosen. The “all or nothing” approach to birth records also ignores the fact that there are two birthparents involved in many adoptions – and they might have very different opinions deserving of equal respect. Ultimately, when considering legislation regarding the sharing of adoption information, it is essential to remember that the various parties to an adoption are all unique individuals with individual rights and preferences, and protecting all parties involved is both possible and necessary.

Don’t reject the common ground.

When a debate is argued in extremes, sometimes ground that might have been gained is instead surrendered for nothing. A recent example of this was seen in New Jersey in 2011, when “all or nothing” birth records advocates worked to promote and pass Bills A1406 and S797 in the state legislature. Governor Christie was concerned that the new law would break longstanding promises made to birthparents by retroactively

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¹⁴ Sachdev, P., “Achieving openness in adoption: Some critical issues in policy formation,” *American Journal of Orthopsychiatry* 61 (2), pp. 241-249 (April 1991).

changing laws and opening previously sealed records without their consent. Still, he understood adoptees' wishes to acquire information, and recommended a compromise of a conditional veto that established a confidential intermediary system instead of rejecting the law outright. This system would have allowed original birth certificates to be released with the permission of involved parties, or opened after contact was pursued and determined to be impossible (as in the case of a deceased birthparent). But mandatory open records advocates and the legislators representing them chose not to accept this compromise, claiming that it was insufficient. As a result of their inflexibility and refusal to compromise, their cause remains at a standstill – New Jersey adoptees' birth certificates are sealed, and can only be released by court order.

For years, similar common-ground solutions have been offered in many states, and “all or nothing” advocates have refused to accept anything less than the absolute right to open records without condition or limitation. Even when an alternative would have given the majority of these advocates exactly what they want, they turned it down and accepted nothing in exchange.

Compromise offers promise and keeps promises.

NCFA has long been an active participant regarding the issue of birth records, and has worked to ensure that birth records are not opened without consent when a promise of anonymity has been made amongst the parties to an adoption. As enthusiastically as NCFA supports open adoption and the free, voluntary exchange of information between birthparents, adoptive parents, and adopted individuals, we also oppose laws that allow one party to an adoption to have access to private information regarding another party or force contact without consent or proper notice.

It is crucial that adoption advocates continue to value and advocate for those who prefer confidentiality, because in most cases they cannot speak out on their own behalf without losing the very confidentiality they seek. NCFA believes, and experts also maintain,¹⁵ that there is no “one size fits all” approach to the issue of open records¹⁶ – because each adoption is contracted between unique individuals with their own preferences that should be honored. While adoption reunions, information sharing, and the receipt of birth records is often beneficial in satisfying the normal curiosity of those with confidential adoptions, it can also be alarming or even traumatic to

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¹⁵ In “Openness in Adoption: Outcomes for Adolescents within their Adoptive Kinship Networks,” the authors explain: “One type of adoption arrangement is not ‘best’ for all adoptive kinship networks, and, further, within a kinship network, what works well for one party, at one point in time may not be best for other parties.” See: Grotevant, H., Perry, Y., and McCoy, R., “Openness in Adoption: Outcomes for Adolescents within their Adoptive Kinship Networks,” *Adoption Factbook IV* (2007), p. 440.

¹⁶ *Ibid.*

be contacted or to have your information at risk of exposure when such complete disclosure is against your wishes. Further, governments that promise confidentiality in a proceeding only to revoke it later can seriously damage their credibility through such retroactive changes.

Fortunately there are a variety of flexible options that can allow state governments to create a system that seeks to benefit those interested in more information and value those who might prefer not to fully disclose. Mutual consent registries and confidential intermediary systems can be efficient, effective programs by which any information exchanged is offered voluntarily. Following is a further explanation of both systems.

Mutual consent registries are also known as “passive systems,” meaning that participants must elect to include themselves. There are advantages and disadvantages to this type of system. The most significant advantage is that it is not difficult to implement; a simple registry can be easily registered for and maintained. A voluntary registry also guarantees that all participants are interested in and open to contact, because registering requires their proactive participation.

Mutual consent registries must receive broad publicity to be fully effective. Parties to adoption must be made aware of this system, or those interested and open to contact cannot benefit from it. Information exchange and reunion cannot occur unless both parties to an adoption take the initiative to register. (In modern adoptions, many states that maintain mutual consent registries ask birthparents to make their contact preference known at the time of placement, increasing the long-term efficacy of registries, and update their preferences later should they change.)

There are also some limitations to the type of information that can be shared through mutual consent registries. In most registries, participants agree to disclose birth records or establish contact if the other party also wishes to do so. There are not as many options for those who might prefer to interact anonymously, share only social and medical information, or find another option that might better meet their individualized needs.

On the whole, mutual consent registries respect the option of confidentiality while providing adequate means for those interested in contact to connect. Because the mutual consent registry is an entirely voluntary system, it is impossible, within a properly functioning system, for any past promise of privacy to be breached.

Confidential intermediary systems require more work to establish and maintain, but they also have the ability to provide many more options along a spectrum of openness/contact. In a confidential intermediary

system, a party interested in information contacts the designated state office, and a trained intermediary is assigned or contracted to review the adoption records and contact the other party or parties to the adoption in an appropriately sensitive way.

Confidential intermediary systems can be created to allow for the exchange of as much or as little information as each party prefers. The availability of options would depend on the legislation establishing the particular intermediary system, but they could be designed to include open and direct contact, anonymous contact (in which information might be passed through the intermediary), access to original birth records, social and medical information only, or the ability to make contact with other biological relatives as well as birthparents. Confidential intermediary systems have the additional benefit of protecting the interests of individual birthparents who may no longer be connected to one another: an adoptee might learn the identity of or have contact with one birthparent, while the other parent's name and information is withheld.

The best confidential intermediary systems can also provide a layer of professionalism and protection that may help prevent oversight or unintended psychological damage. The ideal intermediaries are trained, professional social workers or adoption service providers that have experience in adoption and can help to facilitate the smoothest possible contact, providing (or referring for) counseling/mediation as needed to establish healthy communication. All trained confidential intermediaries should be capable of providing sensitive, non-directive support within a system that furthers the wishes of the requester while protecting the rights of both parties.

Even in professionally facilitated situations, searching parties should be aware that reunions are sensitive matters, and not always successful. For example, Catholic Charities of Newark reports that between July 2007 and February 2010, their agency facilitated 32 reunions. In all of these cases, both parties had consented to the reunion, received counseling pre-contact and post-contact, and engaged in a process that involved exchanging letters, emails, and phone calls prior to a face-to-face meeting. Of the 32 reunions facilitated, six reunions had negative outcomes, while 26 resulted in positive outcomes.¹⁷ While many people may be capable of successful, positive reunion experiences without professional support, it seems that even when these valuable services are available, the experience may still turn out negatively for some participants – as evidenced by the approximately one in five that did so even after trained professionals with

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¹⁷ Information on adoption search and reunion collected by Catholic Charities in the Archdiocese of Newark.

Catholic Charities of Newark assisted in their adoption reunions. In all reunions resulting from a confidential intermediary system, effective intermediaries are essential to giving all individuals involved the best possible preparation and support, ensuring that news and information is given in a sensitive and appropriate manner, and helping to secure the best possible outcomes for the reunited parties.

While a confidential intermediary system can offer many options and benefits for participants, it also requires clearer and more detailed legislation than some other systems due to the many potential outcomes, as well as an ongoing system to train and regulate intermediaries. The system in Maryland is one good example of a confidential intermediary system,¹⁸ and legislation has also been proposed in New Jersey that would provide a good means of information sharing while balancing privacy concerns.¹⁹ NCFCA fully supports appropriately implemented and monitored confidential intermediary systems, which provide the greatest number of possible options to the greatest number of individuals while offering access to information, protecting privacy rights, and providing professional facilitation and support throughout the process.

Final Recommendations and Conclusion

As a longtime advocate for all members of the adoption triad as well as a proponent of openness in adoption, NCFCA offers the following recommendations for state legislators and others attempting to determine how best to facilitate information exchange and contact between adoption parties:

Remember that you are dealing with individuals, not statistics.

When considering the right answer regarding information sharing in confidential adoptions, think about the different opinions held by various autonomous parties and the value that each individual's opinion ought to have in the way the events of his or her own life unfold.

Be creative. The simplest way of dealing with a complicated question may not be the best. When creating laws regarding adoption information sharing, provide as many options as possible. Establishing a flexible registry or offering a wide selection of contact options through a confidential intermediary system helps to ensure that all individuals involved in an adoption can find a level of exchange that they are comfortable with.

¹⁸ Maryland Annotated Code, Family Law, Title 5. Children, Subtitle 4b. Adoption Search, Contact, and Reunion Services. Available at: www.lexisnexis.com/hottopics/mdcode/

¹⁹ In 2010, the Assembly and Senate in New Jersey introduced A1406 and S797 during their 2010-2011 Session.

Honor all the voices in the discussion. In this debate, too often a passionate and highly vocal group of advocates aims to take away the confidentiality promised to and still desired by some individuals. Whenever possible, state governments should honor the promises stated or implied in the laws passed. If it is necessary to change laws retroactively, it should be done with great caution, to protect all citizens and preserve the trust the public places in lawmakers.

Although the discussion regarding information sharing in adoption has and will continue to become less contentious as openness in adoption becomes increasingly common and modern best practices ensure, at minimum, the exchange of important medical and social information, it is important to consider the rights and needs of those promised confidentiality in the past as well as the small number that still choose it today. NCFCA will continue to advocate for holistic, creative, and respectful ways to meet the unique needs of all individuals involved in adoption, and champion current and future systems that protect the individual rights and wishes of all participants in adoption. We are committed to openness in adoption as well as access to records with mutual consent, and we hope that, as states determine how to best address this complicated issue, they will recognize the benefits of systems that offer information to interested parties whenever possible while still maintaining privacy for those who value it.



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