

Open Records

Ethica believes that every American citizen should have complete and unencumbered access to information about his or her identity, including access to his or her original birth certificate, medical records, and social history. *Ethica* believes that limits on such access are a violation of a person's basic human rights, and that equality demands that adult adoptees be afforded the same freedom of access granted to every other American citizen today.

The question of open records is often framed as a balance between the rights of adult adoptees to know their history and the rights of birth parents who were promised anonymity. However, a careful review of the legislative history behind sealed records will show that this premise is flawed. Below, you will find a brief legislative history of sealed records in the United States and documents you can access to further your research of this topic.

We've also had the opportunity, through our international work, to review legislation or legislative reviews from various countries around the world. A brief synopsis of the laws of various countries will show that a large number of countries that are considered by the United States to be peers in the areas of law and human rights already grant adult adoptees access to their records.

The Right to Know

Alex Haley wrote, "In all of us there is a hunger, marrow deep, to know our heritage, to know who we are, and where we have come from. Without this enriching knowledge, there is a hollow yearning; no matter what our attainments in life, there is the most disquieting loneliness."¹

He was, of course, talking about people wanting to know about their ancestors. If this sentiment applies to genealogical research, it certainly applies to the natural desire of adoptees to know about their ancestors. Yet, adoptees are denied this right.

Every other American citizen has a right to obtain his or her original birth certificate. The laws in the United States do not require that adults, in general, receive permission from their parents before obtaining a birth certificate. Even if the adult was the child of long-divorced parents and even if one parent has abandoned the family, the adult still has the right to his or her birth certificate.

In fact, many American citizens seek out the birth certificates of others in their family as part of genealogical research. The laws of the United States do not require that citizens obtain family permission before doing genealogical research, nor is permission needed to obtain birth certificates for ancestors. The inequality of this situation raises considerable concerns about the constitutional rights of adult adoptees to equal protection under our laws.

Many would purport that the birth parent of an adopted child has a right to privacy in regard to the decision to place a child for adoption, and that such rights supersede the right of the adopted person to know his or her original

¹ Alex Haley, "What Roots Means to Me," in *Readers' Digest*, v.110 (May 1977)

identity. It is, however, impossible to reconcile this belief with the reality that all other Americans have a right to their original birth certificates. This stance would mean, for example, that an unmarried woman who became pregnant and chose to place her child for adoption could ensure that her child would not know her identity or have knowledge of her decision—thus, some purport, allowing her to move on with her life.

On the other hand, consider a scenario that could occur if this same woman were to become pregnant and chose to parent her child, as most women do today. Suppose that six months after the birth of her son, she marries and she and her husband raise the child together, never telling the child that her husband is not his biological father. When their son becomes an adult and acquires a copy of his birth certificate, he will have knowledge that the man he considers to be his father is not his biological father. In this scenario, the laws of our states do not allow the mother to shield this knowledge from her child.

This simple example highlights the incongruence of laws which seal adoption records and original birth certificates. If, as some claim, such laws were enacted to protect birth parents, then those laws would have been extended to scenarios like the one above. In fact, a review of the legislative history behind closed records shows that protection of birth parent rights was not the basis for sealing adoption records.

Legislative History

Elizabeth Samuels penned a comprehensive review of adoption and access laws for the Winter, 2001 Rutgers Law Review. Her report can be accessed in full at: <http://www.americanadoptioncongress.org/legislation.htm>. This brief legislative history is drawn from her report:

Until the mid 1920s there were virtually no confidentiality provisions in adoption law. Records were open to all, including the general public, birth and adoptive parents, and adoptees.

By the mid 1930s to the early 1940s, more states had enacted confidentiality provisions. However, these provisions did **not** apply to parties to the adoption—birth parents, adoptive parents, and adoptees.

A survey of State adoption statutes in 1938 reported ten states in which court records were close to all **but** parties of interest. By 1943, more than half of the States reported these provisions. These provisions were enacted to prevent the public from accessing adoption records, but even states which sealed original birth certificates opened those records upon demand of the child, birth parents, adopting parents, or the court.

In the late 1940s to early 1950s there was a significant shift in law and court records were closed in many states to all persons. For original birth certificates, however, access was limited to the public but not to the adult adoptee.

The draft 1953 Uniform Adoption Act made provision for access by adult

adoptees to original birth records and upon approval of these recommendations in 1955, the Iowa Law Review described the “prevailing modern view” that court records were to be opened only by court order but that original birth records could be inspected by adult adoptees.

A dramatic change began to occur by 1960 when 28 states reported that original birth certificates were open only by court order. However, 20 states or 40 percent still allowed birth certificates to be inspected by adult adoptees without court order. Over the following 20 years, virtually all states closed their records to adult adoptees as well.

What caused this dramatic shift in law after 1960? Samuels notes that the historical record from the 1930s to the 1960s shows that the authoritative voices advocated for closing records to the general public, but not to adult adoptees, *to protect adoptees* from embarrassing disclosures of the circumstances of their births and *to protect adoptive parents* and children from being interfered with by birth parents. Samuels notes that there was virtually *no discussion* of the need to protect birth parents from adult adoptees seeking information about their birth families.

Samuels goes on to explore reasons why laws might have changed after 1960 and discusses in depth the era in which all were encouraged to view adoption as a “perfect and complete substitute for creating a family” and how this attitude led to a shroud of secrecy around adoption. Efforts by adult adoptees to know their roots were often dismissed as idle curiosity. Later literature began to include the idea that records had been sealed to protect birth parent confidentiality—a significant deviation from the legislative record.

Ethica encourages all to explore the legislative history behind sealed records and to consider whether the reasons to close records stemmed from proper legal concerns or from social contexts that are no longer applicable. It is also interesting to note the surveys cited by Samuels—particularly those which show that an overwhelming percentage of birth parents do not oppose contact from their adult children.

The International Picture

The breadth and scope of international adoption law makes a comprehensive review impossible. We have, however, compiled a brief summary of the various laws governing access by some countries which have comparable legal systems to the United States and which join the U.S. in recognizing the value of human rights.

At least eight European countries (Germany, Belgium, Spain, Netherlands, United Kingdom, Greece, Norway, and Poland) provide adult adoptees with open access to their original birth certificates. Four of these countries (Germany, Belgium, Spain and the Netherlands) have obligatory access because identifying information is included in the birth certificate. Therefore, when an adoptee requests an official birth certificate they are automatically granted access to their original birth identity. The other four countries provide access on request from adoptees. These requests, however, are not subject to judicial or administrative authorization and have no other

conditions of consent. These countries are joined by, *inter alia*, Brazil who provides access to adult adoptees on the basis of constitutional provisions. A brief synopsis of the law of each country follows:

Germany

At the age of 16, the child has access to the birth and family register or may request an extract of the birth register with the marginal entry of his/her adoption from the Registrar's Office. This request is not subject to administrative or judicial approval.² (Section 61: Federal Personal Status Act PStG)

Belgium

The adult adoptee and the legal representative of the minor adoptee may ask for a copy of the original birth certificate.³ (Art. 45, par.1, al.2 of the Civil Code)

Spain

Spain allows adoptees to request certified copies of their birth certificates, which indicate identities of their original parents.⁴ (Article 34, 36, 37 of the Law on Civil Status and articles 12, 139, 141, 167 and 170 of the regulations of the Law on Civil Status)

Netherlands

The Netherlands allows adoptees to request copies of their birth certificate, which contain the names of their original parents.⁵ (Article 22 of the Civil Code)

United Kingdom

Adult adoptees in the United Kingdom can file a request to receive a copy of their original birth certificate. This request is not dependent on judicial or administrative approval. Children under 18 can request a copy of their original birth certificate if they already know the name of their birth parent(s). Open records were granted in the U.K. in 1975.⁶ (Article 51A of the Adoption Act of 1976)

Greece

² See "*Internal and Intercountry Adoption Laws*", International Social Services, Geneva. German Law Review by Reinhard Schnabel, Jurist, revised by Dr. Ranier Frank, University of Heidelberg, January 1996.

³ See, "*Internal and Intercountry Adoption Laws*", ISS, Isabelle Lamerant, revised by Professor Michel Verwilghen, Department de Droit International Universite Catholique de Louvain, January 1996.

⁴ See, Lammerant, Isabelle, "*L'Adoption Et Les Droits De L'Homme En Droit Compare*", 2001, page 553.

⁵ Lammerant, 2001, page 553.

⁶ Lammerant, 2001, page 554.

Adult adoptees in the United Kingdom can file a request to receive a copy of their original birth certificate. This request is not dependent on judicial or administrative approval.⁷ (Article 1559 of the Civil Code; Art 22 of Law no. 344/1976)

Norway

Adult adoptees in the United Kingdom can file a request to receive a copy of their original birth certificate. This request is not dependent on judicial or administrative approval.⁸ (Article 12, par. 2, of Law on Adoption)

Poland

The law allows an adoptee for whom a new birth certificate was issued the right to request that the information in the original birth certificate be made available to him/her once he/she becomes of age.⁹ (Art 48 (4) and Art. 49 (2) of Law on the Registration of Births, Deaths and Marriages of 29 Sept. 1986, Legal Gazette No. 36/1986, Item 180, as amended by the Law of 26 May 1995)

Brazil

The Constitution grants as a fundamental right the inviolability of privacy, full access to information contained in the official record for the clarification of situations of personal interest (art., X, XIV, and XXXIV "a"). The Statute (Law 8069/90) establishes that the child and the adolescent enjoy all the fundamental rights inherent to the human person. In addition, Brazil ratified the United Nations Convention on the Rights of the Child, integrating it to the internal legal system by Legislature Decree number 28 (14-04-1990). Consequently, an inquiry by the adoptee for information and/or a request for an original birth certificate may not be denied.¹⁰

About Ethica

Ethica is a nonprofit corporation that seeks to be an impartial voice for ethical adoption practices worldwide, and provides education, assistance, and advocacy to the adoption community. We strive to develop organizational policy and recommendations based solely on the basic ethical principles underlying best practices in adoption and the best interests of children. In order to maintain our independence, *Ethica* does not accept donations from adoption agencies or others who place children for adoption.

It is our belief that the term "ethical adoption services" pertains to more

⁷ Lammerant, 2001, page 554.

⁸ Lammerant, 2001, page 554.

⁹ See, "*Internal and Intercountry Adoption Laws*", ISS, by Elzbieta Holewinska-Lapinska, Institute of Civil Law, University of Warsaw. Revised by Marie-Francoise Lucker-Babel for International Social Services, August 2000.

¹⁰ See, "*Internal and Intercountry Adoption Laws*", ISS, Isabelle Lamerant, revised by Professor Michel Verwilghen, Department de Droit International Universite Catholique de Louvain, January 1996.

than the actual act of adopting a child. For services to be truly ethical, they must involve family preservation efforts, birth family counseling and advocacy, adequate pre-adoption training for adoptive parents, ethical placement practices, post-adoption services which include disruption assistance, and the fulfillment of lifelong responsibilities to adoptees and their families.

Ethica is working toward long-term reform of both the domestic and international adoption systems. Our Board of Directors brings a variety of experiences and viewpoints to inform our work, and we are assisted by an advisory board of legal and medical professionals, adoption and child welfare professionals, birth parents, adoptive parents, and adult adoptees. Currently, our board is engaging in crisis management efforts in the Marshall Islands and Haiti, developing programs for support of birth parents, conducting aid programs for children in Liberia and foster children in the United States, and assisting the Hague Conference in developing training materials for countries implementing the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*.