

## **SECTION ON ARCHIVES AND HUMAN RIGHTS ADOPTION AND IN-CARE ARCHIVES:**

### **Access rights of adults to documents relating to their own childhood experience of adoption or being in care**

#### **1. INTRODUCTION AND DEFINITIONS**

1.1 This is not a campaigning document nor a charter. It is intended to serve as a guide to established good practice and to give an overview of all the considerations which need to be taken into account. Aimed at archivists and other professional users of personal records, it reviews a wide range of issues which derive from archives relating to children who have either been adopted or taken into care. Its special focus is access to these records. This includes the work that archivists need to do (including processing and cataloguing) to maximise possibilities of access.

1.2 The guide avoids the term “children’s rights”, which is used in many important documents and charters, notably documents published by the United Nations. “Children’s rights” may be seen as a very wide-ranging and multi-faceted subject, the proper subject of full-length books and studies, but arguably too broad for a single best-practice document. The focus of this guide is on one aspect of children’s rights, namely access to documents relating to childhood circumstances, with particular reference to access by adults to documents relating to their own childhood experience of adoption or being in care.

1.3 Archival records have other important functions in respect of adoption and in-care, which are outside the main purpose of this document. For example, where adoptions have been undertaken illegally or where children have been taken into care by force or abuse, archival records may help birth-parents to trace lost or stolen children.

1.4 In some legislations, some archives centres and some projects, “adoption and in-care files” may be regarded as a single entity. For other purposes, however, they may be regarded as two separate categories of archives. It should not be assumed that all matters raised by records of adoption apply equally to records of children in care, and vice-versa.

1.5 It should be helpful to include definitions of “adoption” and “in-care” at an early stage in this guide. Adoption concerns situations where children, for a variety of reasons, are unable to live with their birth-parents and find, or are allocated, a home with new adoptive parents. Unlike fostering, which may be a temporary arrangement, adoption is expected to provide the child with new life-long parents, and may

consequently involve a change of family name (with clear implications for archivists). Care, in the present context, describes circumstances where the children are separated, willingly or unwillingly, from their birth-parents and are raised and nurtured in institutions designed for the purpose. Such institutions may be private or public or a hybrid, and are often described as children's homes. Secure children's homes are a type of home where the child's freedom of movement is restricted and the child is kept in a locked environment.

1.6 A number of projects have dealt with children in particular societies who have been forced into care and placed in secure children's homes. This guide will deal with such coercive and abusive examples of children being taken into care, as well as circumstances which are a normal part of civil society.

## 2. IMPORTANT DISTINCTIONS

2.1 The first distinction which should always be made in respect of files relating to archives of adoption and care is between coercive and abusive custody of children, on the one hand, and care and accommodation provided to meet the needs of children for whom it is not possible to live with their birth-parents, on the other. The first type of case presents a major topic of human rights concern; the second is a necessary part of civilised society. The two types of archival file will need to be treated in very different ways.

2.2 A second distinction of importance to archivists is whether the file in question should be regarded as current or historic. A file will be regarded as historic when all the named persons in the file are dead, or when a legally-determined period of time (e.g. 100 years) has expired.

2.3 In a similar way, there will be a distinction between archival files which are open and files which are closed. Closure of archival files to the general public may be for a legally determined period (e.g. 100 years), or for a period related to the lifetimes of the persons named in the file.

2.4 One of the most important distinctions within current files, which archivists will try to discover, is whether the birth-mother named in the file is alive or dead. If the birth-mother is known to be alive, her rights will have to be taken into consideration at every stage. It is less usual for the birth-father to be involved in these files, but if they are named their rights must also be considered.

2.5 Forced removal of children from their birth-parents is likely to be emotive and traumatic, but there are two different main categories to distinguish : (i) forced removal as part of systematic human rights abuse (see Part 3 below) ; (ii) forced removal, in the

best interests of the child, from parents judged to be harmful to the child or inadequate, following a legal process.

2.6 Across international borders, there will be a distinction between countries where adoption is recognised as a legal process, and countries where adoption is not recognised by law.

### **3. HUMAN RIGHTS ABUSES, ESPECIALLY RELATING CHILDREN'S CARE HOMES**

3.1 The human rights content of some of these documents is of the greatest importance, and is increasingly recognised in United Nations reports and policy statements.

3.2 The first aspect of human rights abuse in these types of archives is the forced removal of children from their parents. Forced removal of children may be undertaken for a number of reasons, some of which will be regarded as criminal or actionable. Abusive examples may include circumstances of war; victimisation of racial minorities; attempts to suppress a child's cultural heritage; and racist hostility to the norms of children's "first nation" origins.

3.3 The second aspect of human rights abuse, very often, concerns the way that children are treated when in care. Such instances of abusive treatment do not always leave archival records, although certain institutions have maintained punishment books.

3.4 Separately, there are also cases where, in war zones, children are removed from their parents and forced to become soldiers or to take on other military roles in armies and gangs. These cases are acknowledged here, but are outside the scope of a guide on adoption and care.

### **4. RIGHTS OF THE CHILDREN NAMED IN THE FILES**

4.1 The children named in adoption and in-care files will often, as adults, wish to consult the files which relate to their childhood and birth-parentage.

4.2 Children who have been abusively or improperly taken into care should have a right to uncover the circumstances of the offence committed against them.

4.3 On the other hand, children who have been placed for adoption or care by due legal process, in the child's best interests, will have their rights of access to archives which concern them balanced by other legitimate rights.

4.4 It is unhelpful and tendentious to refer to files concerning particular children as "their" files. It is preferable to use terms such as "data concerning them".

## 5. OTHER RIGHTS AND OBLIGATIONS

5.1 A number of other rights have to be taken into account when reviewing access to adoption and in-care records within the legal framework of civil society. This relates to cases where human rights abuses are not involved.

5.2 In cases where it has been established that there has been a case of human rights abuse, the right of access to the file by its subject is paramount.

5.3 In cases of adoption and care as processes of civil society, rights of access are balanced by other rights.

5.4 The rights of the birth-mother, and sometimes the birth-father and other birth-family members, should be safeguarded by the archivist.

5.5 The archivist must respect the privacy rights and the laws of data protection which are established in the legislation of their country. While privacy may be an area of subjective judgment, data protection usually has great legal strength, and some legislations specify that data protection outweighs other rights.

5.6 The archivist must comply with the legal requirements in force in their country, as when archival files are closed by law.

5.7 The archivist must determine and respect “interested party” rights, which will vary from country to country.

5.8 The archivist will need to scrutinise the file to assess its impact on the privacy rights of professional workers, e.g. social workers, police, hospital workers; lawyers, immigration officers. Privacy rights may extend to the guards and custodians of secure children’s homes.

5.9 There will be a need for the local administration to be able to document all its actions, and there will be a consequent obligation to retain and maintain full and verifiable records.

5.10 In cases where a right of access by the child is agreed, there is no automatic right of access by grandchildren. Archivists are aware that people who have accessed the files relating to their own childhood often do not wish their own children to have access to the files. This is especially the case in one of the “shame” circumstances which may be found in such files (e.g. under-age sex, rape, prostitution, incest).

5.11 If the archivist is certain that the child is dead, it may be easier to open the file to other family members and interested parties, but rights of data protection and privacy will still have to be respected.

5.12 Some legislations may specifically require privacy for the identity of sperm donors.

5.13 The archivist will bear in mind the need to comply with United Nations resolutions on the rights of the child and rights of family reunification.

## **6. PROFESSIONAL BEST PRACTICE**

6.1 The following best practice examples may be regarded as recommendations.

6.2 The aim of the archivist will be to maximise access to files in their custody, subject to the legal and social obligations in effect in their country or jurisdiction.

6.3 For files with two or more main subjects (e.g. child and birth-mother; child, adoptive parents and social workers) multiple access permissions will normally be necessary.

6.4 Where one main subject wishes to access the file but it is not immediately possible to contact the other main subject or subjects, it is good practice to put a marker in the file to indicate this status (e.g. “Birth mother would like to be in contact with child if child so wishes”). This is sometimes called “double flagging”.

6.5 Where access to the file is agreed, best practice would include mediated access to sensitive and painful material, i.e. the presence of a social worker to prepare the subject for the contents which they may encounter and then to be present when the file is opened.

6.6 The archivist may decide to separate confidential from non-confidential material, in order to facilitate earlier access to the non-confidential.

6.7 The archivist may decide to make available copies rather than originals, especially when the contents of the file are likely to be shocking or disturbing. Where possible, digital copies will be preferred to photocopies, as digital copies may include evidence of any redaction.

6.8 The archivist may put in place a “Waiver request” procedure, where this is permitted by national legislation. (This means that a person who wishes to consult a non-disclosable file may request access to it by derogation from the non-disclosability rule; access may depend upon the concurrence of the official body which created the file.)

6.9. There should be a recognition of the need to unify, or cross-reference, documents which may be held by different ministries or other government bodies

6.10 The archivist may need to request or negotiate sets of regulations (or best practice guidance) under which relevant documents can be transferred from ministries and other government bodies to professional archival institutions

6.11 The possibility should be investigated of creating a separate, and privileged, category of “archives required to verify human rights abuses, against children and others”.

6.12 The archivist should be able to direct the information seeker to additional sources if the main sources of information are not available (or destroyed or lost). Finding aids, using international standards such as ISAD(G) and ISAAR-CPF, should therefore indicate these complementary sources.

6.13 Best practice indicates that replies to requests for access (whether positive or negative) should be in writing, and should be checked by lawyers associated with the archival institution before being sent. Oral denials of access are not acceptable practice.

6.14 A register should be kept of all requests for access to files of this nature.

6.15 Best practice will also involve the existence of review bodies and appeals panels to scrutinise access decisions taken by archivists.