

OFFICE OF THE INFORMATION)
COMMISSIONER (QLD))

S 75 of 1993
(Decision No. 95024)

Participants:

DR RICHARD ALLEN FOTHERINGHAM
Applicant

- and -

QUEENSLAND HEALTH
Respondent

- and -

ANOTHER
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - matter in issue comprising medical records relating to the first wife of prominent Queensland author Arthur Hoey Davis ("Steele Rudd") - applicant seeking access to the matter in issue to assist in the preparation of a biography of Arthur Hoey Davis - matter in issue concerns the personal affairs of a deceased person - whether disclosure of the matter in issue would, on balance, be in the public interest within the terms of s.44(1) of the *Freedom of Information Act 1992* Qld.

Freedom of Information Act 1992 Qld s.28(1), s.44(1), s.51(3), s.78
Libraries and Archives Act 1988 Qld
Libraries and Archives Regulation 1990 Qld s.23(1), s.23(3)

Getman v National Labor Relations Board 450 F.2d 670 (D.C. Cir. 1971)
Stewart and Department of Transport, Re (1993) 1 QAR 227
Uksi and Redcliffe City Council, Re (Information Commissioner Qld, Decision No. 95018,
16 June 1995, unreported)

DECISION

1. I affirm the decision under review (being the internal review decision made on behalf of the respondent by Mr David Butt on 5 March 1993).
2. I also find that the additional documents falling within the terms of the applicant's FOI access application, that were discovered during the course of my review, comprise exempt matter under s.44(1) of the *Freedom of Information Act 1992 Qld.*

Date of Decision: 19 October 1995

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F N ALBIETZ
INFORMATION COMMISSIONER

Participants:

DR RICHARD ALLEN FOTHERINGHAM
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- and -

QUEENSLAND HEALTH
Respondent

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REASONS FOR DECISION

Background

1. Dr Fotheringham seeks review of the respondent's decision to refuse him access to information concerning Mrs Violet Christina Davis, who for the last 33 years of her life (until her death in July 1952) was resident in institutions controlled by the respondent. The former husband of Violet Christina Davis, Mr Arthur Hoey Davis (who died in 1935), was an author well known in Australia by his pen name, "Steele Rudd". Dr Fotheringham is a senior lecturer in the Department of English at the University of Queensland. At the time he sought access to the matter in issue, Dr Fotheringham was preparing a biography of Arthur Hoey Davis, commissioned by the University of Queensland Press. The matter in issue is claimed by the respondent to be exempt matter under s.44(1) (the "personal affairs" exemption) of the *Freedom of Information Act 1992* Qld (the FOI Act).
2. By letter dated 27 November 1992, the applicant sought access under the FOI Act to "any and all information" held by the respondent in relation to Violet Christina Davis. The initial decision on behalf of the respondent was made by Ms Susan Harris, and was communicated to the applicant by letter dated 5 February 1993. Ms Harris identified one document as falling within the terms of Dr Fotheringham's FOI access application. Ms Harris decided to refuse access to the document under s.44(1) of the FOI Act on the basis that the document contained matter concerning the personal affairs of Violet Christina Davis and that the balance of public interest favoured protection of the document from disclosure.
3. By letter dated 21 February 1993, Dr Fotheringham applied for internal review of Ms Harris' decision, making fairly detailed submissions as to why disclosure to him (for the purposes of his research) of the information concerning Violet Christina Davis would, on balance, be in the public interest. The internal review was undertaken by the respondent's Director, Executive Support Services, Mr David Butt. By letter dated 5 March 1993, Mr Butt informed the applicant that in addition to the "one page file card" previously located, another three folios had been located which fell within the terms of the FOI access application. Mr Butt also advised that he had contacted the "next of kin" of Violet Christina Davis, a granddaughter, who objected to the applicant being given

access to the documents on the basis that it would constitute an invasion of her grandmother's privacy. Mr Butt determined to refuse the applicant access to all four documents, under s.44(1) of the FOI Act. The relevant parts of Mr Butt's reasons for decision are as follows:

The facts upon which I have based my decision are as follows:

- (1) *The documents contain matter which relate to the personal affairs of Mrs Davis and that of a third party.*
- (2) *Persons who have matter relating to their own health record or who are cited in official records of this Department have the right to have information which relates to their own personal affairs kept confidential and would not expect to have this information released publicly.*
- (3) *The next of kin has been further consulted regarding release of the documents and has, with your consent, been provided with your arguments for release.*
- (4) *The next of kin has argued strongly to have the personal affairs of her grandmother remain confidential and has refused permission for the document to be released.*
- (5) *The documents contain information which, if released, could reasonably be expected to be of concern to Mrs Davis, if she were alive.*

...

I have considered the public interest issues for and against release of the documents. I have taken into consideration your argument that as an important literary figure to both Queensland and Australia there is a public interest in having information pertinent to Arthur Hoey Davis and his immediate family being placed in the public domain. You argue this will assist biographers, readers and students of Australian literature to fully and accurately understand the circumstances in which he wrote. You also argue that for a person of such major public significance the public interest for release 57 years after Mr Davis' death and 40 years after Mrs Davis' death outweighs the rights of increasingly distant descendants to restrict access to material which is personal principally to the original person and his or her immediate family. Given this length of time you argue that sufficient time has elapsed for the document to be released to bona fide researchers.

You also argue that to deny access to these documents, being the only unbiased contemporaneous reports of matter of some cultural and historical significance already partly placed in the public domain, would be contrary to the public interest.

I have weighed the above public interest considerations against the public interest of Mrs Davis' and other third parties and the expressed desire of her next of kin to exempt these particular documents. An attempt was made to raise the consciousness of the next of kin in regard to your arguments for release particularly about the cultural significance of the documents to Australian literature. However, even after having read your papers the next of kin is adamant that release of the documents would constitute an invasion of her grandmother's privacy

I have considered your argument for public interest release against the public

interest of individuals who are treated in the Queensland Public Hospital system, albeit some considerable years after an individual's death. Health records usually contain information which is highly sensitive and personal to the individual being treated. I have decided that the next of kin's desire for this information to remain confidential to the family should be respected and is in the public interest ...

4. By letter dated 29 April 1993, Dr Fotheringham applied to me for review, under Part 5 of the FOI Act, of Mr Butt's decision.

The external review process

5. The granddaughter of Violet Christina Davis, who had been consulted by the respondent pursuant to s.51 of the FOI Act, was informed of Dr Fotheringham's application for review. Pursuant to s.78 of the FOI Act, she applied to participate in the review and her request was granted. She is referred to in these reasons for decision as the third party.
6. The respondent provided me with copies of the documents dealt with in Mr Butt's internal review decision. These documents had been obtained by Mr Butt from records held at the Baillie Henderson Hospital, Toowoomba. During the course of the review, Dr Fotheringham wrote to me on 3 May 1994 stating that his own research had indicated that the State Archives held some records relating to Violet Christina Davis for the period 1919-1928, when she was a resident at Goodna mental hospital. Dr Fotheringham asserted that the terms of his FOI access application were wide enough to cover these documents and asked that they be dealt with in this review. The respondent subsequently agreed to my request that it locate and forward to me copies of any documents held by the State Archives concerning the residence of Violet Christina Davis at Goodna mental hospital between 1919 and 1928. The documents in issue (hereinafter referred to as documents 1-4, respectively) therefore comprise the following:
 1. a file record card concerning Violet Christina Davis (which was included among the records obtained from both the Toowoomba and Goodna hospitals);
 2. patient admission, and observation, records in respect of Violet Christina Davis during her residence at Goodna mental hospital from August 1919 to May 1928 (2 pages in length);
 3. patient admission, and observation, records in respect of Violet Christina Davis during her residence at Toowoomba mental hospital from May 1928 to her death in July 1952 (2 pages in length); and
 4. laboratory report, results of blood test on Violet Christina Davis, July 1951.
7. Dr Fotheringham stated in his application for external review that he accepted that the documents, the subject of his application for external review, would disclose information about the personal affairs of a deceased person, but submitted that disclosure would be in the public interest. The issue for determination in this review is, therefore, easy to define, but involves a difficult value judgment, i.e. whether disclosure of information in the medical records of Violet Christina Davis would, on balance, be in the public interest, because of the significance of her life and circumstances to the life and work of Arthur Hoey Davis, a major figure in Queensland's literary/cultural history.
8. In his application for external review, Dr Fotheringham summarised his case for disclosure of the documents in issue as follows:

In summary the reasons why it is in the public interest to disclose these documents to me are:

- (i) *the significance of the material to the cultural history of Queensland because of the importance of Steele Rudd as a writer in Queensland;*
- (ii) *the length of time since these documents came into existence;*
- (iii) *Mrs Davis was hospitalised on 8 August 1919 and died on 28 July 1952. The documents have no continuing relevance to any issue currently being decided. None of the children of Mr and Mrs Davis are still alive;*
- (iv) *the fact that the information contained in these documents appears to already be substantially in the public domain. I referred earlier to the biography of Steele Rudd by Eric Davis. I enclose marked with the letter "K" pages 143-146 and 151-152 which deal with these matters. I have also obtained oral accounts of these events from members of the Davis family and there was contemporaneous reference to them in the Courier Mail (see Courier Mail 17/10/1933 page 11c which is attached and marked with the letter "L") and Mr Davis divorced his wife in October 1933 on the grounds of incurable insanity.*
- (v) *the importance of the issues in writing a scholarly biography of a literary figure. One must look at his life not for scandalous or prurient reasons but because the major and significant events of that person's life affect both their writing and their literary reputation. The incarceration of Mr Davis' wife was obviously a most significant event in his life and without any objective and proper reference to it, his biography would suffer enormously. I dealt with these matters in more detail in my [application for internal review] (Attachment F).*
- (vi) *the Act does not provide a blanket exemption for documents of the type I have requested. As there is no more important writer in Queensland's history, it is difficult to see, if I am not allowed access, in what circumstances a biographer would be allowed to inspect such material over the objection of a dead person's next of kin. Such a person has a right to be consulted but the Act does not provide a right of veto. The reasons put forward by Mr Butt would apply equally to any personal health records of this type where a descendant of a dead person did not agree to their release. Such a blanket exemption is not provided by the Act. Although it may be correct to take [the third party's] views into account, it must be remembered that Arthur Hoey Davis was not only a private person he is an important public figure in the history of Queensland.*

A decision to release the documents in this case would not give carte blanche to the release of the medical records of persons who have been dead for 40 years. It would however recognise that in the particular circumstances of this case where the documents deal with the life of one of Queensland's most important historical figures that their release is justified in the public interest.

9. In fairness to the respondent, I do not think it is correct to say that it has approached the question of access to the documents in issue as though the third party had a right to veto access. Since it is obviously not possible to consult with a deceased person over a question of access to information concerning the deceased person's personal affairs, the practical alternative recognised by the legislature (see s.51(3) of the FOI Act) is consultation with the deceased person's closest relative.

The views expressed by the closest relative, whether for or against disclosure of information concerning the deceased's personal affairs, will ordinarily be relevant factors for an agency to take into account when deciding, pursuant to the discretion conferred by s.28(1) of the FOI Act, whether or not to claim an exemption which is available. The views expressed by the closest relative may also, according to the circumstances of a particular case, be entitled to some weight in the application of the public interest balancing test incorporated within s.44(1) of the FOI Act. Dr Fotheringham is correct to say that the mechanism for obtaining views from the closest relative was not intended to permit the closest relative a right to veto access; however, I do not think it can fairly be said from the terms of the respondent's initial and internal review decisions that the relevant decision-makers approached their tasks on that basis.

10. In support of his case in this review, Dr Fotheringham supplied letters from some eminent academics in the field of Australian literature, attesting to Dr Fotheringham's reputation as a leading scholar and researcher in the field of Australian literature, and to the literary/cultural significance of Dr Fotheringham's research on the life of Arthur Hoey Davis. Dr Fotheringham also provided evidence, from his research to date, of the extent to which information about the medical history and personal affairs of Violet Christina Davis was already in the public domain, and argued that it was important that he be allowed to draw on all relevant records for the purpose of his biography, rather than "*conclusions being based on surmise and an incomplete or fragmented record*".
11. I considered Dr Fotheringham's case to be well-presented and persuasive in raising a public interest consideration favouring disclosure that was worthy of being accorded considerable weight. It was, however, pitted against public interest considerations (favouring non-disclosure of the matter in issue) which are universally recognised in our community as carrying substantial weight, namely, privacy considerations and the preservation of the confidentiality of a person's medical records.
12. With Dr Fotheringham's publication deadline looming, an opportunity was arranged for him to confer at my office with the third party and representatives of the respondent, to present his case for disclosure of material (which he anticipated may be contained in the documents in issue) that would be of significance to his biography of Arthur Hoey Davis. The meeting took place on 14 November 1994. Dr Fotheringham prepared a fresh written submission, and other materials, which he distributed to the third party and the respondent's representatives in the course of addressing them on the public interest in disclosure. In Dr Fotheringham's absence, the Deputy Information Commissioner explored with the other participants the possibility of a compromise solution, whereby some parts of the matter in issue, considered to be the only parts which could conceivably be of significance for the purposes of Dr Fotheringham's project (in light of the case presented by Dr Fotheringham) would be disclosed by consent of the participants, in return for Dr Fotheringham agreeing not to pursue access to the balance of the matter in issue. This proposal, however, was not acceptable to the respondent or the third party.
13. Directions were then given for the preparatory steps necessary to ready the matter for a formal determination. On 19 December 1994, the respondent lodged with me, and provided to the other participants, a written submission in support of its claims for exemption. Both the applicant and the third party subsequently informed me that they did not wish to make further submissions, but wished to rely on the material (and expressions of view) that they had previously conveyed in the course of the review.

The application of s.44(1) to the matter in issue

14. Section 44(1) of the FOI Act provides:

44.(1) Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its

disclosure would, on balance, be in the public interest.

This provision clearly extends the scope of its protection to information concerning the personal affairs of deceased persons.

15. In my reasons for decision in *Re Stewart and Department of Transport* (1993) 1 QAR 227, I identified the various provisions of the FOI Act which employ the term "personal affairs", and discussed in detail the meaning of the phrase "personal affairs of a person" (and relevant variations thereof) as it appears in the FOI Act. In particular, I said that information concerns the "personal affairs of a person" if it relates to the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase "personal affairs", that phrase has a well accepted core meaning which includes:

family and marital relationships;

health or ill-health;

relationships and emotional ties with other people; and

domestic responsibilities or financial obligations.

Whether or not matter contained in a document comprises information concerning an individual's personal affairs, is essentially a question of fact based on a proper characterisation of the matter in question.

16. All of the matter in issue (apart from two brief notations in document 3 recording the existence of divorce proceedings and the grant of a *decree nisi*) concerns the health and medical treatment of Violet Christina Davis. There is no doubt (and I understand Dr Fotheringham concedes) that disclosure of the matter in issue would disclose information concerning the personal affairs of Violet Christina Davis. Accordingly, the matter is *prima facie* exempt from disclosure to the applicant under s.44(1) of the FOI Act, subject to the application of the public interest balancing test incorporated within s.44(1). The question posed for my determination, therefore, is whether the public interest inherent in satisfaction of the test for *prima facie* exemption under s.44(1), in combination with any other public interest considerations favouring non-disclosure, is outweighed by public interest considerations which favour disclosure of the matter in issue.
17. Dr Fotheringham submits that there is a public interest in making available to members of the public a detailed and accurate biography of Arthur Hoey Davis, a Queenslanders whose works have cultural significance Australia-wide. As "Steele Rudd", Mr Davis wrote the "Dad and Dave" series, including "On our Selection", amongst other works. Dr Fotheringham submits that elements of the biography are unsatisfactory in that there is little detail known of the effect upon Arthur Hoey Davis, and upon his writing, of his wife's illness and hospitalisation. The applicant submits that disclosure of the documents would provide an accurate record and put an end to rumours concerning the nature of the illness suffered by Violet Christina Davis, and whether she received support from her family and in particular Arthur Hoey Davis.
18. The applicant submitted as evidence his curriculum vitae and references by other academics, namely Professor Elizabeth Webby, Professor of Australian Literature at the University of Sydney, Professor Ken Goodwin, former Professor of Australian Literature at the University of Queensland, Professor Peter Edwards, Darnell Professor of English at the University of Queensland, and Dr Craig Munro, publishing editor at the University of Queensland Press. These establish Dr Fotheringham's skills and experience in the fields of drama and literary studies, and his reputation as a leading Australian literary scholar. I mention this having regard to a decision under U.S. freedom

of information legislation by the U.S. Court of Appeals in *Getman v National Labor Relations Board* 450 F.2d 670 (D.C. Cir. 1971). The applicants there were law professors proposing to conduct a study into aspects of labor union election rules. They sought details of union members' names and addresses. The court considered as relevant to its determination the study's public interest purpose, the researchers' skills, and the likelihood of completing the proposed study without the requested information.

19. The references provided by Dr Fotheringham are also intended to support his claim that disclosure of the matter in issue would be in the public interest. For example, Dr Craig Munro opined:

Richard Fotheringham's biographical research on the life and work of this public literary figure is of considerable national significance. Along with Lawson, Paterson and C.J. Dennis, "Steele Rudd" defined in his books an Australian ethos, and it is now important to establish historically the key facts of his life for this scholarly biography.

Richard Fotheringham is a scholar of skill and experience, whose integrity is beyond question. It is of vital public interest that he be given access to all files relating to Steele Rudd to enable the publication of a balanced and accurate study which will benefit the whole community as well as advance Australian literary scholarship.

Professor Webby and Professor Edwards made comments to similar effect.

20. Professor Goodwin went a little further. He said that Dr Fotheringham's biography "*would be seriously incomplete without some accurate mention of the difficult relations between "Rudd" and his wife. That story can be told only through access to Mrs Rudd's [sic] health records.*" Professor Edwards also opined that "*[it] will be a great pity if he [Dr Fotheringham] is denied access to material which is undoubtedly of crucial biographical importance and which relates to events so far in the past.*" These comments are based on mere surmise as to what information might be contained in the documents in issue. While I have no pretensions to expertise as an historian or literary biographer, I feel quite confident, based on my examination of the matter in issue, in asserting that most of it could have no conceivable benefit or significance for the purposes of Dr Fotheringham's project. Dr Fotheringham had, for instance, indicated during the course of the review that he has no use for document 4 (the results of blood tests on Violet Christina Davis). Most of the matter in issue is similar in character, being of a routine medical nature: its disclosure would be merely invasive of personal privacy with no compensating benefit of the kind asserted by Dr Fotheringham, i.e. shedding light on the nature of the mental illness suffered by Violet Christina Davis and its effect on the life and work of Arthur Hoey Davis. I consider that most of the matter in issue is, therefore, clearly exempt matter under s.44(1) of the FOI Act.
21. During the course of the review, Dr Fotheringham identified the kinds of information (which he anticipated might be contained in the documents in issue) which would be of benefit or significance for the purposes of his project. These were:
- (a) any information which would shed light on the nature of the illness suffered by Violet Christina Davis (including how it was described at the time of diagnosis/admission) particularly whether it had a physical or psychological basis, or whether it was a hereditary mental illness, or one induced by circumstances and incidents in her life, especially in her married life;
 - (b) any information regarding what support or lack of support her family, and in particular Arthur Hoey Davis, gave to her; and

(c) any material which might relate to some anecdotal information, obtained by Dr Fotheringham in his research, to the effect that Violet Christina Davis did recover to some extent, and was in the opinion of some members of the family able to be released, but Arthur Hoey Davis refused to approve her release.

22. In fact, there is no information in the documents in issue relevant to (b) and (c) above. There is a small amount of information relevant to (a) above in document 2, and on the first page of document 3 (which, in effect, reproduces part of the first page of document 2).

23. I accept that there is a public interest in making available to members of the public a detailed and accurate biography of Arthur Hoey Davis. The public interest considerations which may (according to the terms of particular exemption provisions in the FOI Act) impact on whether or not access should be allowed to information in the possession of government agencies are not confined to considerations of the kind recognised in s.5 of the FOI Act. There is no doubt that one of the major reasons why the Queensland government regulates the preservation of, and access to, public records (see the *Libraries and Archives Act 1988 Qld* and the Minister's second reading speech on its introduction, Hansard, 12 November 1987, pp.4161-4162) is in recognition of the public interest in facilitating historical and cultural research which can contribute to a society's understanding and identification of itself, as well as medical, scientific and many other kinds of research which benefit the community.

24. The question is whether disclosure of the small segment of the matter in issue, which might further the public interest considerations relied upon by Dr Fotheringham, is warranted when weighed against the public interest favouring non-disclosure which is inherent in the satisfaction of the test for *prima facie* exemption under s.44(1), and any other relevant public interest considerations which favour non-disclosure of the matter in issue. In this regard, the respondent submitted that there is a very strong public interest in protecting the privacy of health records of individuals, and preserving the trust and confidence of the public in the confidentiality of health records. The respondent submitted that:

... this argument is of particular significance in relation to the sensitive area of mental health records. Many patients of public mental health services have no choice but to attend such facilities, due to their mental health status or financial situation. Individuals' health records held by these facilities can contain extremely intimate details about their condition, feelings and behaviour (which could, at times, be seen to be maladaptive). As you would appreciate, it is critical that health workers are aware of such details for the ongoing care and treatment of these patients. The failure of individuals who may be suffering a mental illness to provide this information for fear that it may become public (during their life or after their death) could reasonably be expected to have an adverse effect on these persons' health status and treatment. As a consequence, the Department would not be able to successfully fulfil its mandate [to provide optimal quality health services to the public].

25. In his application for external review, Dr Fotheringham correctly pointed out that a decision to release the documents in this case, because (through circumstances particular to this case) their release is justified in the public interest, would not give *carte blanche* to the release of the medical records of other deceased persons. While I am not prepared to discount entirely an inhibiting effect of the kind referred to in the respondent's above-quoted submission (should some of the matter in issue be disclosed), I do not think that factor carries any great weight as an additional public interest consideration favouring non-disclosure. The crucial issue, in my view, is whether the public interest considerations favouring disclosure to which Dr Fotheringham has pointed are sufficiently strong to

justify the intrusion into the personal affairs of Violet Christina Davis, which in this case involves intrusion into the confidentiality of her medical records.

26. The applicant submitted that the substance of the information which concerns the personal affairs of Violet Christina Davis has become matter in the public domain. In *Re Uksi and Redcliffe City Council* (Information Commissioner Qld, Decision No. 95018, 16 June 1995, unreported), at paragraph 48, I found that, in the particular circumstances of that case, the public interest favouring non-disclosure which is inherent in satisfaction of the test for *prima facie* exemption under s.44(1) of the FOI Act, carried less weight than usual because the substance, and much of the detail, of the information concerning the personal affairs of Mr and Mrs Uksi had become a matter of public record.
27. The applicant submitted that under s.44(1) there must be a real question as to whether the matter in issue is not otherwise already disclosed, except in particulars relating to the accuracy and detail of information which is public property and public knowledge.
28. In the present case, the applicant submitted evidence to support his contention that the following facts are in the public domain:
 - (a) Violet Christina Davis suffered from a mental illness causing her admission to hospital in 1919 (per Eric Davis, Life and Times of Steele Rudd; and the divorce petition filed in the Supreme Court of Queensland by Mr Davis in 1933);
 - (b) Violet Christina Davis remained hospitalised due to her mental illness apart from two brief furloughs in the early 1920s (mentioned in the divorce petition);
 - (c) Arthur Hoey Davis was granted a divorce in 1934 on the grounds of the unsoundness of mind of Violet Christina Davis (Courier Mail, 17 October 1933; and the divorce petition records filed in the Supreme Court);
 - (d) Violet Christina Davis died, aged 83, in the Toowoomba Mental Hospital, on 28 July 1952 (noted in her death certificate).

On the evidence, I am satisfied that the information in points (a) to (d) above is in the public domain.

29. While the fact that Violet Christina Davis suffered from a mental illness is a matter of public record, there is no evidence before me to establish that other information contained in the documents in issue, apart from the facts recited in (a) to (d) above, is in the public domain. It would appear that details of the diagnosis, and ongoing health and treatment, of Violet Christina Davis are not in the public domain. In my opinion, that information cannot properly be characterised as mere detail or particulars of information already in the public domain. Therefore, I do not propose to accord less weight than is ordinarily appropriate to the public interest favouring non-disclosure which is inherent in the satisfaction of the test for *prima facie* exemption under s.44(1).
30. In his final written submission, prepared for the purposes of the conference on 14 November 1994, Dr Fotheringham summarised the reasons why disclosure of the matter in issue would be in the public interest, as follows:
 - a. *The undoubted importance of 'Steele Rudd' as an author and Arthur Hoey Davis as a figure in Queensland and Australia's cultural and literary past, present and future;*

- b. *The desirability of the truth being known rather than conclusions being based on surmise and an incomplete or fragmented record;*
- c. *The necessity to examine the effect on many lives of a regime which dealt with psychiatric patients by incarcerating them for very long periods often until their deaths and separating them from their families with the shame rather than compassion with which the community reacted to such a situation;*
- d. *The need to do justice to the memory of [Violet Christina] Davis by an account which refers to the facts and separates them out from the conflicting family accounts;*
- e. *The widespread acceptance that mental illness is no longer a cause of shame but an important matter whose effect on the lives of those it has touched must be dealt with in order to begin to understand what they went through: viz the play and film Tom and Viv with regard to T.S. Eliot and his wife Vivienne who spent the last eleven years of her life in a mental asylum.*
- f. *The fact that the matter sought refers to events which occurred between 42 and 75 years ago, and that mental health records from earlier ages are freely available for research purposes in major archives such as the Archives Office of New South Wales.*

31. I accept that the age of the documents in issue is a relevant factor. Privacy concerns in respect of deceased persons may lose their potency with the passage of time, such that even sensitive personal information eventually reaches a stage where its primary interest or significance is merely historical. This is largely a question of degree. If, for example, Violet Christina Davis had died in 1852 rather than 1952, or a hundred years ago, I think that considerably less weight would be accorded to the protection of her privacy, even in respect of confidential medical records.
32. I am not sure that Dr Fotheringham is correct in his assertions about the Archives regime which applies in New South Wales, but it is not necessary to pursue the point. It is because of the current legislative and administrative policy under the Archives regime which applies in Queensland that it falls to me to deal with the question of access to the documents in issue which were in the possession of the State Archives. Under the *Libraries and Archives Regulation 1990* Qld, public records are ordinarily open to access 30 years from the date of the "last dealing" with that public record, or 65 years in respect of personal or staff files. However, s.23(1) of the *Libraries and Archives Regulation* vests a general discretion in the chief officer of a public authority to impose prohibitions, conditions or restrictions on access. Without limiting this general power, s.23(3) provides that the chief officer may impose prohibitions, conditions or restrictions on access because records contain information the disclosure of which -
- (a) is prohibited or restricted by law;
 - (b) may be prejudicial to the public interest; or
 - (c) may adversely affect the privacy of any person.

The respondent has apparently adopted a policy which involves exercising its discretion under the *Libraries and Archives Regulation* to prohibit open access to records of the kind in question, and instead dealing with any request for access to such records under the FOI Act, thereby ensuring that appropriate attention is given to privacy concerns and other public interest considerations: respondent's written submission, p.5.

33. Subject to the reservation I have expressed at paragraph 29 above, I accept the force of Dr Fotheringham's submissions. He has identified public interest considerations which favour disclosure of some of the matter in issue (being that matter identified in the last sentence of paragraph 22 above), and has drawn attention to factors which detract from the weight to be accorded to the public interest considerations which favour non-disclosure of the matter in issue. Undertaking the relevant balancing process involves a difficult value judgment: one on which, I suspect, reasonable minds might well differ. Ultimately, however, I have reached the conclusion that the public interest considerations favouring disclosure, which have been identified by Dr Fotheringham, are not sufficiently strong to justify intrusion into the medical records of Violet Christina Davis, and I am not satisfied that disclosure of any of the matter in issue would, on balance, be in the public interest. I therefore find that the matter in issue is exempt matter under s.44(1) of the FOI Act.

Conclusion

34. For the foregoing reasons, I affirm the decision of Mr Butt, on behalf of the respondent, dated 5 March 1993. Mr Butt did not deal with the additional documents discovered during the course of my review (see paragraph 6 above). I find that those additional documents also comprise exempt matter under s.44(1) of the FOI Act.

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F N ALBIETZ
INFORMATION COMMISSIONER