



OFFICE OF ATTORNEY GENERAL  
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION  
2015-8

Chairman Robert H. Gilliland  
Workers' Compensation Commission  
1915 N. Stiles  
Oklahoma City, Oklahoma 73105-4918

September 23, 2015

Dear Chairman Gilliland:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

**The Oklahoma Workers' Compensation Commission is composed of three Commissioners who, under various provisions of Title 85A of the Oklahoma Statutes, act as an appellate tribunal in appeals from decisions of Administrative Law Judges, Petitions for Review in adverse benefits decisions made by appeal committees of employers' benefit plans, and arbitration awards made under the arbitration provisions of Title 85A.**

**When acting as an *en banc* appellate tribunal considering such cases, does the deliberative process privilege permit the Commissioners to hold confidential deliberations?**

**BACKGROUND**

Your question was previously asked in conjunction with a prior request regarding whether the Commission was permitted under the Oklahoma Open Meeting Act to deliberate privately in such cases. This office, in Attorney General Opinion 2014-14, opined that 1) because the individual proceedings considered by the Workers' Compensation Commission, when acting as an *en banc* appellate tribunal, were *not* individual proceedings under the Administrative Procedures Act, and 2) because the provisions of the Oklahoma Open Meeting Act allowing deliberation in executive session applied only to individual proceedings under the Administrative Procedures Act, the Oklahoma Open Meeting Act did *not* authorize the Commission to deliberate in executive session. We also concluded that no other statute authorized the Commission to hold confidential deliberations.

In issuing that Opinion, we noted that because the question regarding deliberative process was presently being considered in a pending appeal before the Oklahoma Supreme Court, we could not address your question regarding deliberative process privilege at that time.

The Oklahoma Supreme Court has now ruled in that case, *Vandelay Entertainment, LLC v. Fallin*, 2014 OK 109, 343 P.3d 1273, holding that the deliberative process component of executive privilege exists in Oklahoma—not based on statutory law—but based on both common law and the Oklahoma Constitution. *Id.* ¶ 29, 343 P.3d at 1279. In light of that ruling, you ask us to consider again whether the deliberative process privilege permits the Workers' Compensation Commissioners to confidentially deliberate when deciding individual cases heard by the Commission under the various provisions of Title 85A.

### I.

#### **The OKLAHOMA SUPREME COURT RULED THAT THE DELIBERATIVE PROCESS PRIVILEGE IS ROOTED NOT ONLY IN COMMON LAW, BUT ALSO IN THE STATE CONSTITUTION'S SEPARATION OF POWERS PROVISION.**

In *Vandelay*, the Oklahoma Supreme Court was asked to determine whether the deliberative process privilege existed in Oklahoma in the context of Governor Fallin's assertion of the privilege in response to an Open Records Act request. While the trial court affirmed that the deliberative process privilege exists in Oklahoma, it held so only on the basis of common law. *Id.*, 2014 OK 109, ¶ 4, 343 P.3d 1273, 1275. The Supreme Court went further, holding that the privilege is rooted in both common law and constitutional *inherent powers*—powers reflected in the Separation of Powers Provision of the Oklahoma Constitution. *Id.* ¶¶ 12, 13, 343 P.3d at 1276.

The *Vandelay* Court heavily relied on the court's prior decision in *Ford v. Board of Tax–Role Corrections*, 431 P.2d 423 (Okla. 1967), a case discussing the inherent power of the judicial department of government. *Vandelay*, 2014 OK 109, ¶ 13, 343 P.3d 1273, 1276. In *Ford*, the Court “recognized that *inherent powers are reflected in the separation of powers clause* in Article 4, § 1 of the Oklahoma Constitution.” *Vandelay*, ¶ 13, 343 P.3d at 1276 (emphasis added). In discussing the *Ford* case, the *Vandelay* Court held that the *principles regarding the recognition and protection of inherent powers are equally applicable to all three co-equal branches of government*:

While the *Ford* case dealt with a question concerning the inherent power of the judicial branch, *the principles and analysis this Court applied in recognizing the inherent power of the judiciary are the same for recognizing and protecting the inherent powers of the other coequal branches.*

*Id.* (emphasis added).

The *Vandelay* Court addressed one of the principles recognized in *Ford*, stating:

In *Ford*, this Court concluded the “powers properly belonging” to a branch of government were those “which [are] *essential* to the *existence, dignity and functions [of the branch]*” and include *inherent powers*.

*Id.* ¶ 14, 343 P.3d at 1276 (emphasis added).

Thus, under *Vandelay*, the principle that the “powers properly belonging to a branch of government” are those “which are essential to the existence, dignity, and function of the branch” is a principle that applies with equal force to all three branches of government.

In light of this understanding of the Separation of Powers Clause’s protection of inherent powers, *Vandelay* held that the deliberative process privilege was available to Governor Fallin to protect the confidentiality of the frank, candid discussion and advice she received from her staff and advisors regarding governmental operations, procedures, and decision-making. So ruling, the Supreme Court agreed “with the United States Supreme Court’s view that ‘complete candor and objectivity from advisors calls for great deference from the courts’ in determining the scope of executive privilege.” *Id.* ¶ 19, 343 P.3d at 1277-78. The Court then concluded that the Governor, no less than the President, has a need to receive “‘candid, objective, and even blunt or harsh opinions’ provided by ‘senior and executive branch officials’ *as well as a need to refuse to disclose such advice . . .*” *Id.* (emphasis added).

In the Court’s words, the Governor’s right to receive such advice and consultation:

[I]s *essential to the existence, dignity and function of the Governor as chief executive and lies within the Governor’s inherent power*. The *principle of separation of powers* expressly declared in Article 4, § 1, *protects this privilege from encroachment by Legislative acts, such as the Open Records Act*.

*Id.* ¶ 20, 347 P.3d at 1278 (emphasis added).

In recognizing the constitutional protection afforded the Governor’s deliberative process by the Separation of Powers Clause, the *Vandelay* Court quoted with approval from *Freedom Foundation v. Gregoire*, 310 P.3d 1252, 1258 (Wash. 2013), in which the Court held that refusal to recognize the gubernatorial communications privilege “would subvert the integrity of the governor’s decision making process [thereby] *damaging the functionality of the executive branch and transgressing the boundaries set by . . . separation of powers*.” *Vandelay*, ¶ 18, 343 P.3d at 1277 (emphasis added).

Applying the constitutional principles identified by the *Vandelay* Court, regarding the protection of inherent powers to the deliberations of the Workers' Compensation Commission, we conclude that the Commissioners' deliberations are protected by the deliberative process privilege.

## II.

**FRANK, CANDID AND *CONFIDENTIAL* DELIBERATIONS AMONG THE WORKERS' COMPENSATION COMMISSIONERS ARE ESSENTIAL TO THE COMMISSIONERS' PERFORMANCE OF THEIR QUASI-JUDICIAL FUNCTION, AND ACCORDINGLY, THEIR DELIBERATIONS ARE PROTECTED BY THE DELIBERATIVE PROCESS PRIVILEGE BY VIRTUE OF THE OKLAHOMA CONSTITUTION'S SEPARATION OF POWERS PROVISION, ARTICLE IV, SECTION 1.**

### **A. The Workers' Compensation Commissioners are Constitutionally Vested With the Authority to Exercise the State's Judicial Power.**

The three Workers' Compensation Commissioners are empowered to hear three types of appeals under various provisions of Title 85A of the Oklahoma statutes. First, under the provisions of 85A O.S.Supp.2014, § 78(A), the Commissioners are authorized to reverse, modify, or affirm decisions or awards made by the Commission's Administrative Law Judges. Second, under the provisions of 85A O.S.Supp.2014, § 211(B)(5), the Commissioners may review adverse benefit determinations made under the Oklahoma Employment Injury Benefit Act. Third, under the provisions of 85A O.S.Supp.2014, §§ 322 and 323, the Commissioners may confirm, reverse, or modify arbitration awards entered under Title 85A.

Under the Oklahoma Constitution, the judicial power of the State is not exclusively vested in judges or courts. Rather, under Article VII, Section 1 of the Oklahoma Constitution, both legislative and executive branch bodies are also vested with the State's judicial power:

The judicial power of this State shall be vested *in the Senate*, sitting as a Court of Impeachment, a Supreme Court, the Court of Criminal Appeals, . . . District Courts, and *such Boards, Agencies and Commissions created by the Constitution or established by statute as exercise adjudicative authority or render decisions in individual proceedings.*

*Id.* (emphasis added).

As under Title 85A the Workers' Compensation Commissioners exercise adjudicative authority and render decisions in individual proceedings, the Commissioners are vested with authority to exercise the State's judicial power.

**B. In Exercising the State's Judicial Power, the Workers' Compensation Commissioners Act in a Quasi-Judicial Capacity.**

When the State's judicial power is being exercised by other than members of the Judicial Branch, the power being exercised is referred to as quasi-judicial power.<sup>1</sup> Thus, in all three instances in which the Workers' Compensation Commissioners act as an appellate tribunal, they are performing a quasi-judicial function—the exercise of a judicial power by other than a member of the Judicial Branch of government, such as a judge or justice.

The Commissioners' performance of a quasi-judicial function is not unusual as under the Oklahoma Constitution and statutes, quasi-judicial functions are performed by a variety of Executive Branch entities. Licencing agencies, such as the Oklahoma Board of Dentistry and the Oklahoma Pharmacy Board, act in a quasi-judicial capacity in disciplining their licensees, as does a regulatory commission, such as the Oklahoma Horse Racing Commission, when it conducts individual proceedings to discipline horse owners and trainers. Indeed, even the Attorney General, in issuing Attorney General Opinions, acts in a quasi-judicial capacity. *York v. Turpen*, 1984 OK 26, ¶ 9, 681 P.2d 763, 767.

**C. Confidential Deliberations are an Essential Component of the Decision-Making Process of the Workers' Compensation Commissioners When Acting in Their Quasi-Judicial Capacity.**

In *Vandelay*, discussing the Governor's *need* to seek and receive advice in aid of deliberations and decision-making, the court held that confidentiality was necessary:

[T]he public interest is best served by the Governor seeking and receiving advice to aid in deliberations and decision-making. The United States Supreme Court has observed “[T]hose who assist [executive decision-makers] must *be free to explore alternatives* in the process of shaping policies and making decisions *and to do so in a way many would be unwilling to express except privately.*”

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<sup>1</sup> A judicial act is one performed by the Judicial Branch of government. See *Umholtz v. City of Tulsa*, 1977 OK 98, ¶ 8, 565 P.2d 15, 18, (“A quasi-judicial duty is one lying in the judgment or discretion of an officer *other than a judicial officer.*”) (emphasis added) (quoting with approval from *Gray v. Bd. of County Comm'rs*, 1957 OK 152, ¶ 5, 312 P.2d 959).

A quasi-judicial power, on the other hand, “is one imposed upon an officer or a board involving the exercise of discretion, *judicial in its nature*, in connection with and as incidental to the administration of matters assigned or entrusted to such officer or board.” *State ex rel., Tharel v. Bd. of County Comm'rs*, 1940 OK 468, ¶ 18, 107 P.2d 542, 549 (emphasis added) (quoting *Bd. of County Comm'rs v. Cypert*, 1917 OK 248, ¶ 6, 166 P. 195, 198).

*Vandelay*, ¶ 17, 343 P.3d at 1277 (emphasis added) (quoting, with approval, *United States v. Nixon*, 418 U.S. 683, 708 (1974) (superseded by statute on other grounds)).

Just as the deliberative process privilege is necessary to the Executive function, such confidentiality is equally *necessary* to the Judicial function. The United States Court of Appeals for the Eleventh Circuit discussed the need for deliberative process privilege in the Judicial Branch in *In the Matter of Certain Complaints Under Investigation by an Investigating Committee v. Mercer*, 783 F.2d 1488 (11<sup>th</sup> Cir. 1986). Comparing judges' need for confidential communications with that of the President as explored in *United States v. Nixon*, the Eleventh Circuit Court stated:

*Judges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties. The judiciary, no less than the executive, is supreme within its own area of constitutionally assigned duties. Confidentiality helps protect judges' independent reasoning from improper outside influences. It also safeguards legitimate privacy interests of both judges and litigants.*

*Id.* at 1519-20 (emphasis added).

In a more recent case, an Illinois appellate court described judges' need for confidential deliberations as follows:

*Confidential communications between judges and between judges and the court's staff certainly "originate in a confidence that they will not be disclosed." Judges frequently rely upon the advice of their colleagues and staffs in resolving cases before them and have a need to confer freely and frankly without fear of disclosure. If the rule were otherwise, the advice that judges receive and their exchange of views may not be as open and honest as the public good requires.*

*Thomas v. Page*, 837 N.E.2d 483, 489-90 (Ill. App. Ct. 2005) (emphasis added).

Continuing the discussion, the Illinois appellate court found that *confidentiality* was a *necessary component* of the judicial decision-making process:

*In order to protect the effectiveness of the judicial decision-making process, judges cannot be burdened with a suspicion that their deliberations and communications might be made public.*

....

The *very integrity* of the *process* often *rests on judges' candid communications with their colleagues and staffs* and, as a consequence, the *confidentiality of such matters is a necessary component of the process*.

*Id.* at 490 (emphasis added).

**D. Because Confidential Deliberations Are Essential to the Workers' Compensation Commissioners' Quasi-Judicial Decision-Making Process, the Commissioners' Deliberations Are Protected by the Deliberative Process Privilege.**

As noted above, in deciding the appellate cases before them, the Workers' Compensation Commissioners are exercising the judicial power of the State, vested in them by Article VII, § 1 of the Oklahoma Constitution. In exercising that power, the Commissioners act in their quasi-judicial capacity and have the same need as judges to engage in confidential communications among themselves and with their staff—a necessary component of their quasi-judicial deliberative process. Those performing judicial functions of the State—regardless of whether they are judges and justices in the Judicial Branch; or Executive Officials; or State Agencies, Boards, or Commissions—have the same inherent need as the Governor for *confidential deliberations*. The confidentiality of the pre-decisional deliberative process for those acting in a quasi-judicial capacity *is essential to their function and inherent power*. Accordingly, under the teachings of *Vandelay*, it is beyond the power of the Legislature to deprive those performing quasi-judicial functions, such as the Workers' Compensation Commissioners, of the *confidentiality* of their deliberations. And, as *Vandelay* makes clear, the privilege not only attaches to verbal communications, it also attaches to written communications.

Thus, as a matter of constitutional law, under the State Separation of Powers Provision, the deliberations of the Workers' Compensation Commissioners are protected by the *deliberative process privilege*.<sup>2</sup>

Furthermore, under the teachings of *Vandelay*, communications must be pre-decisional and deliberative to fall within the deliberative process privilege. 2014 OK 109, ¶ 24, 343 P.3d 1273, 1278.

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<sup>2</sup> As Governor Fallin's Exhibits at Tab 7 of the certified appellate Record in *Vandelay Enterprises v. Fallin*, (Supreme Court Case No. 113,187) demonstrates, the deliberative process is not new to Oklahoma. Rather, it has been invoked on numerous occasions: Justice Marion Opala relied on the privilege while testifying in litigation challenging Oklahoma's Anti-Cock Fighting laws (Governor's Exhibit 1, pgs. 52, 53); State Treasurer Ken Miller invoked the privilege to quash a subpoena for his appearance (Governor's Exhibit 2); for decades the Oklahoma Horse Racing Commission invoked the deliberative process privilege in refusing to release deliberative information (Governor's Exhibit 3); and the Department of Securities relied upon the privilege in support of its motion to quash a notice to take the deposition of a department attorney (Governor's Exhibit 4).

Of course, all hearings on the appeals that come before the Commission, as well as the appellate record and the briefs and memorandums filed by the parties, do not fall within the privilege. Rather, the privilege attaches to written or oral deliberative, pre-decisional communications engaged in as part of the Commissioners' decision-making process in cases decided under their judicial power.

The privilege would thus protect all verbal communications among all three Commissioners sitting down to discuss a case, or deliberative communications between two of the Commissioners, as well as such discussions with Commission staff members tasked with aiding the Commissioners in deciding the case. The privilege would further attach to proposed draft orders, staff memorandum prepared in aid of the decision-making process, and any other pre-decisional, deliberative communication related to the cases decided by the Commissioners in the exercise of their judicial power.

Because, as a matter of constitutional law, the Workers' Compensation Commissioners' deliberations are protected by the deliberative process privilege, we conclude that the provisions of Oklahoma's Open Meeting Act, 25 O.S.2011 & Supp.2014, §§ 301 – 314, are not applicable to the Commissions' oral deliberations.

In concluding that confidential deliberations are essential to the Workers' Compensation Commissioners' quasi-judicial decision-making process and that, therefore, such deliberations are protected by the deliberative process privilege, we need not and do not determine the full contours of the deliberative process privilege available to other members of the Executive Branch. Rather, we deal today only with the Workers' Compensation Commission—a Commission created to take over the function of the Workers' Compensation Court.

**It is, therefore, the official Opinion of the Attorney General that:**

- 1. The Workers' Compensation Commissioners are empowered to act as an appellate tribunal in three types of appeals: review of decisions or awards made by the Commission's Administrative Law Judges, 85A O.S.Supp.2014, § 78(A); review of adverse benefit determinations under the Oklahoma Employment Injury Benefit Act, 85A O.S.Supp.2014, § 211(B)(5); and review of arbitration awards, 85A O.S.Supp.2014, §§ 322 and 323.**
- 2. In acting as an appellate tribunal, the Workers' Compensation Commissioners, by virtue of Article VII, Section 1 of the Oklahoma Constitution, are exercising the judicial power of the State and act in a quasi-judicial capacity.**
- 3. Confidential, pre-decisional deliberations are an essential component of the decision-making process when the Workers' Compensation Commissioners act in their quasi-judicial capacity.**

4. Under the teachings of the Oklahoma Supreme Court's decision in *Vandelay Entertainment, LLC v. Fallin*, 2014 OK 109, 343 P.3d 1273, because confidential deliberations are essential to the Workers' Compensation Commissioners' quasi-judicial decision-making process, the Commissioners' pre-decisional deliberations in cases considered in the exercise of their judicial power are protected by the deliberative process privilege by virtue of the Separation of Powers Provision of Article VI, Section 1 of the Oklahoma Constitution.



E. SCOTT PRUITT  
OKLAHOMA ATTORNEY GENERAL



NEAL LEADER  
SENIOR ASSISTANT ATTORNEY GENERAL

