



ROD UNDERHILL, District Attorney for Multnomah County

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September 23, 2019

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Re: Petition of Donald Scott Upham, requesting all communications regarding the arbitration of Upham v. Cook.

Dear Mr. Upham and Ms. Xu:

In his public records petition, dated September 15, 2019, petitioner Donald Scott Upham requests this office to order Xin Xu to disclose:

Any notes, emails, and text messages to or from any person regarding any facet of Xin Xu's involvement in the arbitration of *Upham v. Cook*, any emails and text messages written to or from any person regarding the bar complaint filed by Xin Xu against Donald Scott Upham, and any records related to the arbitration or the bar complaint.

According to the Oregon eCourt Case Information (OECI) system, Multnomah County Circuit Court Presiding Judge Stephen K. Bushong appointed¹ Ms. Xu as an arbitrator² in *D. Scott Upham vs. H. Dick Cook*, which is listed as Multnomah County Circuit Court Case number 18CV57547.

On May 2, 2019, Ms. Xu, an attorney in private practice, informed petitioner and his attorney, in a letter by way of email, that she had been appointed. A telephonic hearing for summary judgment was held on July 12, 2019. Ms. Xu provided a ruling in the case on August 28, 2019. In her letter to petitioner, Ms. Xu stated that she was self-reporting to the Oregon State Bar her judicial conduct that had been called into question by petitioner. She also wrote that she would report petitioner's conduct to the Bar. On September 1, 2019, petitioner requested all written communication from Ms. Xu regarding the arbitration and the bar complaint.

On September 15, 2019, Mr. Upham filed this petition, stating in his petition that Ms. Xu had not responded to his Public Records request of September 1, 2019. On September 12, 2019,

¹ See Multnomah County Circuit Court Supplemental Local Rules 13.055, regarding Arbitrators.

² ORS 36.400 provides for Mandatory arbitration programs.

petitioner filed an appeal of the arbitration award in *Upham vs. Cook* and requested a trial. On September 19, 2019, Ms. Xu submitted materials, in response to the petition, asserting that she was not a public body. In the alternative, Ms. Xu stated that if she was a public body, all communications had previously been provided to petitioner.³

DISCUSSION

ORS 192.311(4) defines a public body to include “every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state.”

ORS 192.311(6) states, “‘State agency’ means any state officer, department, board, commission or court created by the Constitution or statutes of this state but does not include the Legislative Assembly or its members, committees, officers or employees insofar as they are exempt under section 9, Article IV of the Oregon Constitution.” A court is a state agency, for the purpose of the Oregon Public Records law.

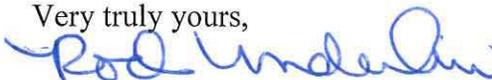
ORS 192.411 states, in part, “[A]ny person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from public inspection.” A District Attorney’s Office only assumes the function of the Attorney General’s office when “a person [is] denied the right to inspect or to receive a copy of any public record of a public body other than a state agency.” ORS 192.415(1).

Ms. Xu is either a private citizen, to which the Oregon Public Records law does not apply, or she is a state agency, due to her appointment by Presiding Judge Bushong in the matter of *Upham vs. Cook*. The Multnomah County District Attorney’s Office does not have jurisdiction in this matter, as this petition should have been filed with the Attorney General’s Office for the determination of whether Ms. Xu, in her capacity as an arbitrator, is a state agency.

ORDER

Accordingly, the petition is dismissed.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

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³ Two checks were written by petitioner’s attorney to Ms. Xu, which were fees in the arbitration. Ms. Xu does not believe the checks are public records, but she has provided copies to MCDA. MCDA has provided copies of the checks to petitioner.