

**IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT**

THE McCLATCHY COMPANY, LLC,
d/b/a *THE KANSAS CITY STAR*,

Plaintiff,

v.

OVERLAND PARK, KANSAS,

Defendant.

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Case No. _____
Chapter 60

Petition to Enforce the Kansas Open Records Act

Plaintiff The McClatchy Company, LLC, d/b/a *The Kansas City Star*, for its causes of action against Defendant Overland Park, Kansas, states as follows:

The Parties

1. Plaintiff The McClatchy Company, LLC, is a Delaware limited liability company which is authorized to conduct business in the state of Kansas.
2. Plaintiff owns and operates *The Kansas City Star*, the metropolitan newspaper serving the greater Kansas City area, including Overland Park, Kansas.
3. Defendant Overland Park, Kansas, is a municipal corporation, duly organized and existing under and by virtue of the constitution and the laws of the State of Kansas.
4. Overland Park is a “public agency” as that term is used in KSA 45-217(f)(1) and is, therefore, subject to the provisions of the Kansas Open Records Act, KSA 45-215, *et seq.*

John Albers' tragic death

5. In the early evening of January 20, 2018, John Albers, a 17-year-old high school student, was alone in his home in Overland Park.

6. Officers from the Overland Park Police Department were dispatched to the Albers' home after the police received a report that Albers was suicidal.

7. Two Overland Park officers arrived at the home at approximately the same time.

8. Shortly after the officers' arrival, the Albers' garage door began to rise and one of the officers, Clayton Jenison, un-holstered his service weapon and approached the rising garage door.

9. As a minivan backed onto the driveway, Officer Jenison fired his weapon twice into the moving minivan.

10. The minivan stopped momentarily, but then made a U-turn in the open driveway and yard of the Albers' property.

11. Officer Jenison then fired eleven more rounds into the minivan.

12. The minivan was being driven by John Albers, who was shot six times by Officer Jenison.

13. John Albers died from those gunshot wounds.

The Police Chief misleads the public – Part 1

14. On February 20, 2018, the Johnson County, Kansas District Attorney held a press conference during which he announced he would not be filing charges against the then still-unnamed officer who shot and killed John Albers, *i.e.*, Officer Jenison.

15. During that same press conference, Overland Park Police Chief Frank Donchez announced that the then still-unnamed officer who shot and killed John Albers, *i.e.*, Officer Jenison, had resigned for personal reasons.



The federal civil rights lawsuit

16. On April 17, 2018, Sheila Albers, the administrator of John Albers' estate, filed a federal civil rights lawsuit against Overland Park and Officer Jenison.

17. On January 11, 2019, Overland Park and Officer Jenison agreed to pay John Albers' estate \$2.3 million in exchange for dismissal of the federal lawsuit.

The Police Chief misleads the public – Part 2

18. In mid-February 2019, following the dismissal of the federal civil rights lawsuit, Chief Donchez gave an interview to Dhomonique Ricks who, at the time, was a television anchor for WDAF-TV, FOX4.



19. The complete, unedited interview of Chief Donchez is available online at https://www.youtube.com/watch?v=APhoP1_s7Bw&feature=youtu.be.

20. During the interview, Ms. Ricks asked Chief Donchez if Officer Jenison was encouraged to leave the force, to which Chief Donchez answered: "He was not."

21. Ms. Ricks then asked Chief Donchez why not, to which Chief Donchez answered: "He left before we even had those discussions."

Deep suspicions arise

22. In June of this year, Sheila Albers came across the KansasOpenGov.org website.

23. That database showed that Overland Park paid Officer Jenison \$81,040 in 2018, even though Chief Donchez had said that Officer Jenison had "resigned" in February 2018.

City	Year	First Name	Last Name	Position	Gross Pay
Overland Park	2018	Clayton Charles	Jenison	Police Officer	\$81,040
Overland Park	2017	Clayton Charles	Jenison	Police Officer	\$46,657
Overland Park	2016	Clayton Charles	Jenison	Police Officer	\$45,566
Overland Park	2015	Clayton Charles	Jenison	Police Officer	\$2,329

24. Ms. Albers reported her findings to members of the local media, who then began investigating the facts.

The truth begins to slowly reveal itself – Part 1

25. On June 30, 2020, Catherine Bernard, a reporter for *The Star*, made a formal written request under the Kansas Open Records Act for the following:

A copy of agreement regarding the employment or resignation of Officer Clayton Jennison following the January 20, 2018 shooting death of John Albers.

A list of any payments made to Officer Jennison following the January 20, 2018 shooting death of John Albers.

26. The same day, Overland Park's Manager of Communications sent Ms. Bernard the following statement:

In the best interest of the community, city officials negotiated an agreement with former Overland Park Police Officer Clayton Jenison which resulted in his voluntary resignation and the City providing a final compensation package that included a severance payment as well as other benefits which, together with his 2018 payments for unused vacation and holiday pay (\$686), compensation time payout (\$2,354), and regular pay (\$8,000), totaled \$81,040. The difference between the \$81,040 and the total of \$11,040 for regular pay, unused vacation and holiday pay, and compensation time payout, represents the severance payment.

27. As set forth in Overland Park's statement, the difference between the \$81,040 Overland Park paid Officer Jenison in 2018 and the \$11,040 Overland Park paid

Officer Jenison for his “regular pay” and accrued benefits, is \$70,000, *i.e.*, the amount of Officer Jenison’s “severance payment.”

The Star’s KORA request for the severance agreement is denied

28. Later the same day, Eric Blevins, an Overland Park Assistant City Attorney, wrote Ms. Bernard and stated:

In response to your attached request for the Separation Agreement between the City and Former OPPD Officer Clayton Jenson, this request is denied pursuant to K.S.A. 45-221(a)(4), 45-221(a)(30), K.S.A. 45-221(a)(2) (*see Mason v. Stock*, 869 F. Supp. 828), and K.S.A. 45-221(a)(3).

29. In response, Ms. Bernard wrote Mr. Blevins and explained to him that KSA 45-221(a)(4) expressly provides that “employment-related contracts or agreements” are open records.

30. Mr. Blevins responded by asserting that a “severance agreement ... is a stand alone document” and is not an “employment-related contract[] or agreement[],” even though he acknowledged that the severance agreement “related to the termination of the employee’s relationship with the City.”

31. Ms. Bernard responded by repeating that KSA 45-221(a)(4) expressly provides that “employment-related contracts or agreements” are open records, and stated that “[t]he act of ending employment is ... related to employment.”

32. Mr. Blevins never responded to Ms. Bernard’s message.

***The Star* appeals the denial of its KORA request**

33. On July 28, 2020, after Mr. Blevins stopped communicating with Ms. Bernard, *The Star*'s counsel wrote Mr. Blevins and requested that Overland Park reconsider the denial of *The Star*'s KORA request for Officer Jenison's severance agreement.

34. *The Star*'s counsel repeated Ms. Bernard's explanation that KSA 45-221(a)(4) provides that "employment-related contracts or agreements" are open records, and stated that "[t]he act of ending employment is ... related to employment."

35. *The Star*'s counsel also explained that the Attorney General's Office, which is responsible for enforcing KORA, has formally stated that a settlement agreement between a city and a former employee "is a 'public record' subject to the KORA" and is not exempt under subsection (a)(4).

36. On August 7, 2020, Michael Koss, another Overland Park Assistant City Attorney, responded to *The Star*'s counsel and acknowledged that "documents concerning termination or other departure from employment" are personnel documents, but continued to assert such agreements are not "employment-related agreements."

37. Mr. Koss also acknowledged the Attorney General's statement that settlement agreements are open records, but asserted that Overland Park's agreement with Officer Jenison was not a settlement agreement.

The truth begins to slowly reveal itself – Part 2

38. On August 17, 2020, Overland Park's City Manager, Bill Ebel, sent a letter to the Mayor and members of the City Council in which he described Officer Jenison's departure not as a "resignation," but as "a mutually agreeable separation."

Regarding Officer Jenison's Resignation and Severance Agreement, it was my decision to enter into a mutually agreeable separation. At no time did I consult with the District Attorney

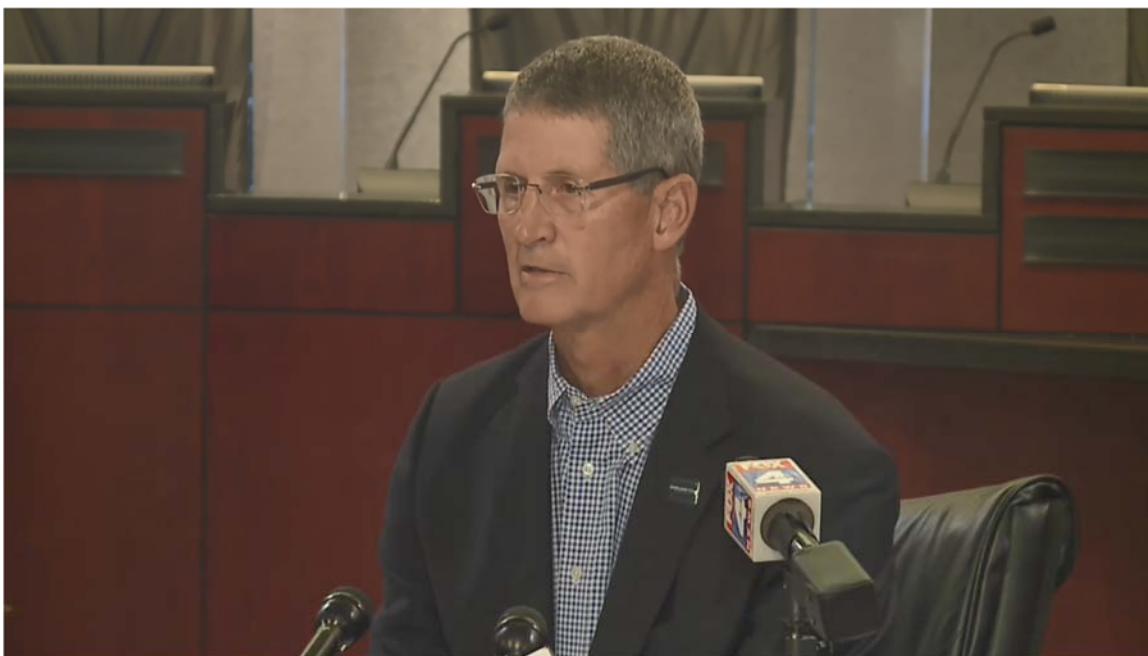
39. On August 21, 2020, Overland Park released a "timeline" put together by Overland Park's Legal Department which showed that Overland Park and Officer Jenison executed a written "Resignation and Severance Agreement" on February 16, 2018.

February 16, 2018 – Officer Clayton Jenison executed a Resignation and Severance Agreement with the City. The voluntary resignation was tendered on February 16, 2018 with an effective

40. Thus, the agreement was executed four days **before** Chief Donchez stated in the February 20, 2018 press conference that Officer Jenison had "resigned."

The truth begins to slowly reveal itself – Part 3

41. Also on August 21, 2020, Overland Park Mayor Carl Gerlach held a press conference.



42. The complete, unedited press conference is available online at <https://fox4kc.com/news/overland-park-mayor-details-timeline-following-2018-officer-involved-shooting-of-teen-john-albers/>

43. During the conference, Mayor Gerlach stated that Overland Park terminated Officer Jenison and that the purpose of the “negotiated” severance agreement was to remove Officer Jenison from the force because “[w]e did not want him as an officer.”

We really didn’t have a way to fire him. So, he could have ... if we would have fired him, we would not have had cause. And if we did not have cause, he could sue us. He could also go back before our civil service board and be reinstated. Well, that’s the one thing we didn’t want to happen. **And that’s why we negotiated to get the agreement signed by him, to get him out. We did not want him as an officer and we didn’t want a chance to have to put him back on the street because the civil service board wouldn’t agree with us firing him.**

They didn’t say he didn’t do anything wrong, they said there wasn’t enough to charge him with, and I think since we, they, couldn’t charge him, we had to make a decision - do we fire him, like I mentioned before, and go through long legal battle and have our civil service board actually put him back on, or **should we negotiate and make sure he’s out of this community and not an officer in our city anymore.** The City Manager made the decision. He’s the one that made that decision to get him out of the community. **And I think everybody agreed, we didn’t want him as a police officer anymore.**

44. These admissions that Overland Park “negotiated” with Officer Jenison to get him to get off of the force are in stark contrast to (a) Chief Donchez’s statement in February 2018 that Officer Jenison had resigned for personal reasons, and (b) Chief Donchez’s statements in February 2019 that (i) Overland Park had not encouraged Officer Jenison to leave the force, and (ii) Officer Jenison left the force before Overland Park had any discussions with him about Overland Park’s desire for him to leave.

The severance agreement is an open public record

45. The Resignation and Severance Agreement between Overland Park and Clayton Jenison is a “public record,” as that term is defined in KSA 45-217(g)(1)(A) in that it is “recorded information ... made, maintained or kept by or is in the possession of [a] public agency,” *i.e.*, the city of Overland Park, Kansas.

46. According to the timeline which Overland Park’s Legal Department created, at the time Officer Jenison executed the severance agreement on February 16, 2018, he was still an employee of Overland Park.

February 16, 2018 – Officer Clayton Jenison executed a Resignation and Severance Agreement with the City. The voluntary resignation was tendered on February 16, 2018 with an effective date of March 4, 2018. Officer Clayton Jenison told the City he chose to resign for personal

47. The Resignation and Severance Agreement between Overland Park and Clayton Jenison is not a closed record under KSA 45-221(a)(4) because it is an “employment-related contract[] or agreement[],” in that it is an agreement between Overland Park and Officer Jenison related to the termination of his employment with the city.

48. In fact, Overland Park has admitted that the Resignation and Severance Agreement between Overland Park and Clayton Jenison is an “employment-related agreement.”

49. On July 2, 2018, Mark Schmid, an Overland Park resident, made a KORA request to Overland Park for the following:

3. Any employment related contract between Clayton Jennison and the City of Overland Park, Kansas and/or the City of Overland Park Police Department, regarding his resignation from employment as an officer of the Overland Park Police Department effective March 4, 2018.

50. In its response to Mr. Schmid's request, Overland Park acknowledged that it had a responsive record, *i.e.*, "the resignation agreement,"¹ but that it was a closed record under KSA 45-221(a)(4), as shown below:

On request number three, for the resignation agreement between Officer Jennison and the city is denied in its entirety under K.S.A. 45-221(a) (4). In addition several portions of the agreement are also exempt from disclosure under K.S.A. 45-221 (a) (30), K.S.A. 45-221 (a) (2) (see *Mason v. Stock*, 869 F. Supp. 828), and K.S.A. 45-221 (a) (3).

51. This contrasts with Overland Park's response to other requests which Mr. Schmid included in his July 2, 2018 request, to which Overland Park responded by stating that it had no responsive records, as shown below:

Requests four, five, six, and eight, we have no records responsive to the requests.

52. Thus, Overland Park acknowledged that the "resignation agreement between Officer Jenison and the city" was responsive to Mr. Schmid's request for "[a]ny employment related contract" between Clayton Jenison and Overland Park.

53. Moreover, in the timeline which Overland Park's Legal Department created, Overland Park acknowledged that the city interpreted Mr. Schmid's request for "any employment related contract" between Overland Park and Officer Jenison as calling for the Resignation and Severance Agreement.

July 2, 2018 – Mark Schmid submits [KORA request](#) (Attachment 10) seeking eight (8) specific documents including any employment related contract for Clayton Jenison regarding his resignation (which the City interpreted to be his Resignation and Severance Agreement);

¹ Note that the city uses the term "resignation agreement," instead of its actual name: "Resignation **and Severance** Agreement." Given that this exchange with Mr. Schmid was before Ms. Albers discovered the severance payments to Officer Jenison, the city was clearly trying to hide the fact the agreement was also a "severance agreement."

54. The Resignation and Severance Agreement between Overland Park and Clayton Jenison is not a closed record under KSA 45-221(a)(4) for the additional reason it is a settlement agreement between Overland Park and Officer Jenison, in that it contains a release of all claims by Officer Jenison, specifically including all claims under Title VII of the Civil Rights Act of 1964 and other employment statutes, in consideration of a payment by Overland Park to Officer Jenison in the amount of \$70,000.

55. In fact, the Mayor stated that the very purpose of the agreement was to settle any potential (and what the Mayor said were valid) claims of wrongful termination, given that Overland Park did not have grounds to terminate Officer Jenison for cause.

We really didn't have a way to fire him. So, he could have ... if we would have fired him, we would not have had cause. **And if we did not have cause, he could sue us.** He could also go back before our civil service board and be reinstated. Well, That's the one thing we didn't want to happen. And **that's why we negotiated to get the agreement signed by him, to get him out.**

[D]o we fire him, like I mentioned before, and **go through a long legal battle** and have our civil service board actually put him back on, or **should we negotiate** and make sure he's out of this community and not an officer in our city anymore.

Count I – Declaratory Judgment (KSA 45-222(a) and KSA 60-1701, et. seq)

56. Plaintiff incorporates by reference the allegations of Paragraphs 1-57.

57. *The Kansas City Star* seeks a declaration of its rights under the Kansas Open Records to obtain a copy of the Resignation and Severance Agreement between Overland Park and Clayton Jenison, which *The Star* asserts is an open record under KORA.

58. Overland Park has denied *The Star*'s request for a copy of the Resignation and Severance Agreement between Overland Park and Clayton Jenison, asserting that the agreement is a closed record under KORA.

59. Accordingly, a genuine controversy exists between *The Star* and Overland Park as to whether the requested agreement is an open or closed record under KORA.

WHEREFORE, Plaintiff The McClatchy Company, LLC, d/b/a *The Kansas City Star*, requests the Court enter its judgment declaring that the requested Resignation and Severance Agreement between Overland Park and Clayton Jenison is an open public record under the Kansas Open Records Act, and that the Court award plaintiff its costs, together with such other and further relief as the Court deems just.

Count II – Injunction (KSA 45-222(a))

60. Plaintiff incorporates by reference the allegations of Paragraphs 1-61.

61. Because the requested Resignation and Severance Agreement between Overland Park and Clayton Jenison is an open public record under the Kansas Open Records Act, the Court should enter a mandatory injunction ordering Overland Park to provide *The Star* with a copy of the requested agreement.

WHEREFORE, Plaintiff The McClatchy Company, LLC, d/b/a *The Kansas City Star*, requests the Court order Defendant Overland Park, Kansas, to provide *The Star* with a copy of the requested Severance Agreement between Overland Park and Clayton Jenison, and that the Court award plaintiff its costs, together with such other and further relief as the Court deems just.

Count III – Attorney’s Fees (KSA 45-222(d))

62. Plaintiff incorporates by reference the allegations of Paragraphs 1-63.

63. As described above, Overland Park has engaged in a years-long pattern of deception, dissembling and doublespeak in an effort to hide, first, the fact of its severance payments to Officer Jenison, and now, the actual severance agreement.

64. Overland Park’s intent to hide the agreement from the Overland Park taxpayers who funded the \$70,000 severance payment is further evidenced by the fact the severance agreement contains a confidentiality clause, purporting to hide it from public view.

65. The severance agreement contains such a provision even though the Kansas Attorney General advised public agencies in 1993 that such provisions are illegal, as set forth in Attorney General Opinion No. 93-55.

If a public agency does not independently have the authority to close a public record, neither it nor its agents have the authority to contractually agree to such a term or requirement. "If an agreement binds the parties, or either of them, to do something opposed to the public policy of the state, **it is illegal and absolutely void**. An agreement is against public policy if it is injurious to the interests of the public, contravenes some established interest in society, violates some public statute, or tends to interfere with the public welfare or safety." *Hunter v. American Rentals*, 189 Kan. 615 (1962). Contracts that contain valid and invalid provisions in which the lawful provisions can be easily severed will be upheld as to the lawful provisions. *Miller v. Foulston, Siefkin, Powers and Eberhardt*, 246 Kan. 450, 462 (1990).

66. Overland Park’s claim that the severance agreement is not an “employment-related contract or agreement” is contrary to the fact the very purpose of the agreement was to terminate Officer Jenison’s employment.

67. As such, the severance agreement plainly “relates” to Officer Jenison’s employment with Overland Park.

68. Additionally, as explained above, Officer Jenison was still an employee of Overland Park at the time he executed the agreement.

69. Moreover, as described above, Overland Park has previously admitted that the severance agreement is an “employment-related contract or agreement” when it identified the severance agreement as responsive to Mr. Schmid’s KORA request for “[a]ny employment related contract between Clayton Jenison and the City of Overland Park, Kansas.”

70. Overland Park’s claim that the severance agreement is a closed record is also contrary to established law.

71. As specifically set forth in KSA 45-221(a)(4), “employment-related contracts or agreements” are not closed records.

72. Additionally, the Attorney General of Kansas has formally stated that a settlement agreement between a city and a former employee “is a ‘public record’ subject to the KORA” and is not exempt under subsection (a)(4).

73. Accordingly, Overland Park’s denial of *The Star*’s request for a copy of the Resignation and Severance Agreement between Overland Park and Clayton Jenison was not in good faith and without a reasonable basis in fact or law.

WHEREFORE, Plaintiff The McClatchy Company, LLC, d/b/a *The Kansas City Star*, requests the Court order Defendant Overland Park, Kansas, to pay plaintiff’s attorneys’ fees, together with such other and further relief as the Court deems just.

Respectfully submitted,

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