

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

JAMES E. WHITNEY  
ADC #163817

PLAINTIFF

v.

No. 4:17-cv-281-DPM

UNITED STATES DEPARTMENT  
OF JUSTICE

DEFENDANT

ORDER

The Department of Justice moves to dismiss Whitney's complaint under Rules 12(b)(1) & 12(b)(6). *No. 8*. Attached to the Department's brief is an affidavit, which in turn attaches Whitney's FOI request and DOJ's response. *No. 9-1*. Whitney has responded with an affidavit. *No. 11*. The FOI request is embraced by Whitney's complaint, but the dueling affidavits are not. If the issue were only subject matter jurisdiction, the Court could consider these record materials, but merits facts beyond the complaint can't be considered on whether the pleading states a claim. *Brooks v. Midwest Heart Group*, 655 F.3d 796, 800 (8th Cir. 2011). The best course is to convert the motion, *No. 8*, into one for summary judgment. FED. R. CIV. P. 12(d). The Court does so. Each party may present all additional materials pertinent to the motion, and more argument, by 27 October 2017.

So Ordered.

D.P. Marshall Jr.  
D.P. Marshall Jr.  
United States District Judge

22 September 2017