

Enclosure 8



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To: COMMANDER, 528th SB (SO)(A), 1st Special Forces Command, Fort Bragg, NC
From: SFC Michael Forbes through James M. Branum, Attorney at Law
Date: March 31, 2023
Subject: Response to request for SFC Forbes to participate in “Human Performance and Wellness Assessment” as part of the USASOC HPW Program, submitted pursuant to UCMJ Article 138 and AR 27-10.

Through legal counsel, SFC Forbes submits this brief (with attachments) as an explanation for why he will not be consenting to participate in portions of the “Human Performance and Wellness Assessment” (hereafter “HPW”) via a third party cell phone app,¹ to gather personally identifiable (via DoD ID number) information and subjectively assess initial baseline and subsequently collected data in the HPW research project, as well as why the order given for all members of 528th SB (SO)(A) to participate in the HPW assessment is an unlawful order.²

Please note that this brief is also submitted as an appeal for redress under the provisions of UCMJ Article 138 and AR 27-10.

Statement of Wrongs

- 1. The HPW Assessment (in its current form), violates military regulations involving the protection of PII (personally identifiable information).**

According to DoDI 5400.11 part 5.1 (a)(3) (ref. A), information gathered by a DOD component about an individual may only be “collected, used, maintained, or disseminated” if certain criteria are met, including:

- A. The information gathered must be “legally authorized, relevant and necessary to accomplish an established DoD mission or function,”
- B. The information must be “accurate, relevant, timely, and complete for its stated purpose,”

¹ See encl. 1.

² See commentary on UCMJ article 90, page IV-24 (ref. D).

C. The information must be “collected directly from the individual to the greatest extent practicable

- c. How the information will be used,
- d. Whether participation is mandatory or voluntary, [and]
- e. The actual consequences of not providing the requested information.”

It is also important to note that all of these provisions apply in the current situation, despite the fact that much of the HPW assessment is being done by way of a third-party app³ because according to DoD 5400.11-R part C1.3 (ref. B), the rules regarding the gathering and retention of data also apply equally to government contractors such as the app owner/developer. Unfortunately, the End-User License Agreement (EULA) for the *BridgeTracker* app⁴ does not mention that the protections of DOD regulations apply to data entered into this app, but does include a mandatory arbitration clause, which prevents a user from suing the company in the event of wrongdoing by the company, such as a data leak or any possible illegal or unauthorized distribution and/or use of the data.

Moreover, the use of third-party surrogates or internal HPW delegates to gather and store data in a personally identifiable database⁵ without required procedural requirements or oversight degrades Soldiers’ protections afforded by the code of federal regulations⁶ and US Army regulation.⁷ This also has the possibility to result in the ever-present danger of “scope-creep.”⁸

³ The app in question is called BridgeTracker and is developed by Bridge Athletic. (<https://play.google.com/store/apps/details?id=com.bridgathletic.tracker>).

⁴ See <https://www.bridgathletic.com/terms-of-use-agreement>.

⁵ The US Army Futures Command’s Combat Capabilities Development Command (DEVCOM) Soldier Center conducted a field test of the Smartabase with a 10th Mountain Division. (https://f.hubspotusercontent40.net/hubfs/6443997/Download%20Assets%20for%20the%20website/Smartabase_OHWS_Customer_Story.pdf).

According to the schedule for the USASOC Human Performance+Wellness Annual Summit dated May 16-20, 2022 (encl. 5), USASOC’s HPW program will also using the Smartabase.

⁶ See 32 CFR 219 (ref. E).

⁷ See AR 70-25 (ref. G).

⁸ See Posard, Marek, et. al “Reducing the Risk of Extremist Activity in the U.S. Military.” (ref. J).

Unfortunately, it appears that many of the above-mentioned criteria were not, in fact, satisfied in a prior similar “requirement”/“directive” by the Command, an ad hoc behavioral health assessment entitled, “Strength Deployment Inventory” which was coordinated by the unit Psychologist in the week prior to the HPW order.

SFC Forbes requested further information of the scope and statutory support, and then learned that the online third party sponsored entity not only gathered and assessed the data but also produced an identifiable report that is distributed back to the sponsor. Based on this information, SFC Forbes chose to not give his consent to the third party “Terms of Service” and “Privacy Policy,” until he could confirm his findings. Moreover, the Psychological Officer also did not provide the scope or statutory support for the assessment and redirected to question his motivation for his request. This request resulted in the Psychological Officer erroneously reporting SFC Forbes to the Command, having not answered either of his questions.

Subsequently, the imminent HPW order and its general opaqueness as demonstrated by the restriction of access to the USASOC HPW portal pages to non-HPW staff⁹ did not provide SFC Forbes with answers to similar privacy concerns. SFC Forbes attempted to determine the statutory support and scope of the sponsored event outside his unit due to the aforementioned consequences he experienced.

2. The HPW Assessment (in its current form) violates military regulations that prohibit the creation of records involving the exercise of first amendment rights by a servicemember, except in limited circumstances.

According to encl. 2, the HPW Assessment will include inquiries into “POTFF” domains¹⁰ including “social & family, spiritual,” and “psychological.”

This is a problem. According to DoD 5400.11-R part C.1.5 (ref. B), the DOD is forbidden from creating records that record information about an individual’s exercise of First Amendment rights including “freedom of religion, freedom of political beliefs, freedom of speech, freedom of the press, the right to assemble, and the right to petition.”

The only exceptions to this policy are if the request for such information is: (1) expressly authorized by Federal statute, (2) expressly authorized by the individual,¹¹ or (3) within the scope of authorized law enforcement activity.

Moreover, assessing “spirituality” is by its nature a violation of two constitutional provisions: (1) the

⁹ See email correspondence dated Dec. 16, 2022 (encl. 4).

¹⁰ See <https://www.socom.mil/POTFF/Pages/default.aspx>.

¹¹ This exception does not apply here, as the members of SFC Forbes unit are being told they must complete the HPW assessment. This means any “consent” given by assessment subjects was not given voluntarily.

Establishment clause of the First Amendment of the US Constitution (ref. K), as well as the “religious test” clause of the Article VI of the US constitution (ref. K).

It is important to note, that while the military (through its chaplain corps, endorsed by religious organizations) provides opportunities for servicemembers to engage in religious free exercise, the military is not allowed to promote any specific religion (or even religion in the abstract). It also may not judge a servicemember based upon his or her religion, or lack of religion. This hybrid system (with denominational endorsement and supervision of the religious functions of the chaplain’s position, and military supervision of the military-specific provisions of service as a chaplain) was specifically created to ensure that competing tensions of the Establishment and Free Exercise clauses are respected.¹² This is very different from the HPW’s spiritual assessment, which is created by and supervised by the military itself.

Furthermore, the use of third-party apps to collect unauthorized information would indicate a surrogate relationship to accomplish a prohibited activity. For instance, DoDI 6490.04 (3)(d) (ref. H), highlights the three situations in which a psychological assessment in a Command Directed Behavioral Health Evaluation (CDBHE) can be required. HPW (as currently implemented) does not satisfy these requirements, and hence the command-directed baseline assessment referenced in encl. 1 pertaining to the “psychological” pillar requires both notification and consent pursuant to the code of federal regulations and US Army regulation.¹³

3. The HPW Assessment (in its current form) is a form of research, and as such requires the informed consent of all participants. "Consent" given under compulsion is not consent.

According to encl. 3, the HPW pilot project of USASOC is a research project. As such, the project is subject to relevant federal statutes and regulations that govern human research,¹⁴ including the requirement for actual informed consent that is free of coercion,¹⁵ which includes an outright bar on “(m)ilitary and civilian supervisors, officers, and others in the chain of command” from “influencing their subordinates to participate in HSR” (human subject research).¹⁶

Moreover, the DOD Patients’ Bill of Rights¹⁷ requires that military patients to be protected from breaches

¹² See Tuttle, Robert W. "Accommodation: The constitutional ground of chaplaincy" *Human Rights* (July 5, 2022), Vol. 47, No. 3/5) (ref. I).

¹³ See 32 CFR 219 (ref. E) and DoDI 3216.02 (ref. F).

¹⁴ See 32 CFR 219 (ref. E) and DoDI 3216.02 (ref. F).

¹⁵ See 32 CFR 219 § 219.116 (ref. E)

¹⁶ See DoDI 3216.02 § 3.9 (f)(3) (ref. F)

¹⁷ See DoDI 6000.14 (ref. C)

of privacy and security¹⁸ and to have the right to informed consent, including the right to consent or "refuse participation in clinical trials or other research investigations as may be applicable."¹⁹

The relevant provisions of the DOD Patients' Bill of Rights are further amplified by the provisions of AR 70-25 (ref. G), which include:

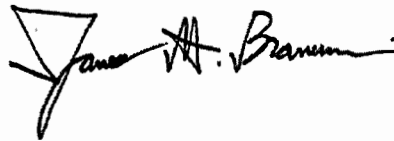
1. A requirement that all participants in research be fully informed and (with a few exceptions) provide voluntary consent,²⁰

2. A requirement that commands publish appropriate directives and regulations to ensure that research subjects are provided with appropriate disclosures to ensure that participation in said research is done in a lawful and consensual manner.²¹

Conclusion and Request for Redress

SFC Forbes is a good soldier and a good NCO. He does his best to follow the law and regulations, because it is the right thing to do. It is not easy for him to decline this order, but it is within his rights under federal law and DOD regulations to decline to participate in portions of the USASOC HPW Pilot program, and that is what he is doing.

For the sake of all members of the unit, you are urged to withdraw the unlawful order for all to participate in the USASOC HPW pilot program at this time.

A handwritten signature in black ink that reads "James M. Branum". The signature is written in a cursive style with a large, stylized initial 'J'.

James M. Branum
Attorney at Law

¹⁸ See DoDI 6000.14, enclosure 2, (1)(c) (ref. C)

¹⁹ See DoDI 6000.14, enclosure 2, (1)(f) (ref. C).

²⁰ See AR 70-25 (3-1)(a)(ref. G).

²¹ See AR 70-25 (3-2)(ref G).

Enclosures:

- 1: OPOrd 22-XXX 528th SB (SO) (A)
- 2: Poster "Assess the Unassessed"
- 3: Memorandum for record dated June 25, 2021 re: USASOC Warfighter Alliance
- 4: Email correspondence dated Dec. 16, 2022
- 5: Schedule of USASOC Human Performance+Wellness Annual Summit dated May 16-20, 2022.

References:

- A: DoDI 5400.11
- B: DoD 5400.11-R
- C: DoDI 6000.14
- D: Manual for Courts-Martial
- E: 32 CFR 219
- F: DoDI 3216.02
- G: AR 70-25
- H: DoDI 6490.04
- I: Tuttle, Robert W. "Accommodation: The constitutional ground of chaplaincy" *Human Rights* (July 5, 2022), Vol. 47, No. 3/5) online at:
https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/accommodation/.
- J: Posard, Marek, et. Al "Reducing the Risk of Extremist Activity in the U.S. Military" online at:
<https://www.rand.org/pubs/perspectives/PEA1447-1.html>).
- K: US Constitution