



# National Transportation Safety Board

Washington, D.C. 20594

Office of General Counsel

October 17, 2018

VIA EMAIL

[Susan.mallery@co.schoharie.ny.us](mailto:Susan.mallery@co.schoharie.ny.us)

Susan J. Mallery, Esq.  
Schoharie County District Attorney  
P.O. Box 888  
Public Safety Facility  
Schoharie, NY 12157

Re: Investigation of a 2001 Ford Excursion stretch limousine accident at the intersection of State Route 30 and State Route 30A in Schoharie, New York  
Saturday, October 6, 2018  
NTSB Accident No. HWY19MH001

Dear District Attorney Mallery:

From our conversations on Sunday, October 14, 2018, as well as from contact that other National Transportation Safety Board (NTSB) staff have had with you and the New York State Police (NYSP), you are aware that the NTSB is concerned about the restrictions you imposed on our timely access to evidence and information related to the fatal limousine accident in Schoharie County on October 6, 2018. You expressed concerns about the involvement of the NTSB in light of your criminal prosecution, which I address more fully in this letter. Thus, I again request your cooperation so that the NTSB may complete a thorough and timely investigation.

As you know, the NTSB Chairman accompanied a multi-disciplinary team of investigators to the crash scene on October 7, 2018. The NTSB is following its mandate to conduct a safety investigation. As we discussed, the NTSB is an independent establishment of the United States, established over 50 years ago, and is responsible for investigating and establishing "the facts, circumstances, and cause or probable cause of" major transportation accidents that occur in the United States. *See* 49 U.S.C. 1131. In the case of highway accidents, our statute grants NTSB jurisdiction to investigate those "highway accident[s] ... the Board selects in cooperation with a State." 49 U.S.C. § 1131(a)(1)(B). The NTSB is not a regulatory agency in the conventional sense -- it does not promulgate operating standards and does not certificate organizations or individuals. NTSB investigations are non-adversarial proceedings and are not conducted for the purpose of determining the rights or liabilities of any person. 49 C.F.R. § 831.4. The goal of our work is to foster safety improvements, through formal and informal safety recommendations, for the traveling public.

As I mentioned to you, the NTSB has been asked by senior leadership of the Federal government to conduct this investigation expeditiously to determine if urgent safety recommendations may be issued related to the limousine industry in hopes of preventing another tragedy like this one.

Throughout the week of October 7, the NTSB investigators were in contact with the NYSP about the progress and planned activities for the NTSB investigation. In fact, because the NYSP is a party to the NTSB investigation, it had participated in the NTSB's planning and progress meetings. Through those contacts, the NTSB understood that the NYSP wished to have a forensic exam of the vehicle. The NTSB agreed that it would wait until the forensic examiner was available and we would join that exam. As the week progressed, the ability of the NTSB to join that exam eroded from full participation to observer, to observer without taking photos or notes, to being barred from the exam. In my discussions with you, you claimed that you do not believe that the NTSB has authority to be on the scene of the investigation in light of the criminal prosecution, you are concerned about the NTSB releasing information about the investigation, and you are concerned that through its work and observations, NTSB staff could be witnesses called in the criminal investigation.

I addressed your concerns during our conversations, and as promised, provide additional information now. Attached is a multi-page statement of the NTSB's authority in highway crashes and its interactions with states. Second, other than the press conferences that occurred last weekend, until the accident investigation is complete, the NTSB's release of information is measured and includes only factual information. Because the NYSP is a party to the investigation, the NTSB will consider its request to review the public statements before they are released, and if desired, I would review the statements with you to contemplate any potential impact on your prosecution.

Similarly, your concern about the NTSB staff being called as witnesses is misplaced. As I mentioned, aside from jurisdictional issues, which the Safety Board does not waive or concede, a subpoena for testimony does not comply with the Board's governing federal regulations. See 49 C.F.R. Parts 835 and 837. If a party attempts to enforce a subpoena, the NTSB will remove the matter to federal court for resolution consistent with our regulations and other governing law. In particular, with regard to testimony in criminal matters, NTSB regulations require attorneys to send requests for such testimony to the NTSB's Office of General Counsel. 49 C.F.R. § 835.10. NTSB employees may testify only as to the factual information they obtained in the course of an investigation. As the General Counsel, I will decline the request that they testify regarding matters beyond the scope of their investigation and shall not authorize any expert or opinion testimony. 49 CFR 835.3(b). With these constraints, it is highly unlikely that an NTSB employee would testify. In the 50 year history of the NTSB, I estimate that employees have testified less than 20 times in criminal matters, and most often, that testimony was voluntarily provided because of the nature of the case.

On Sunday, you then stated that the NTSB could not participate or be present during the vehicle examination because the search warrant issued on October 12, 2018 by Honorable George R. Bartlett III, County Court Judge sitting as a Local Criminal Court Justice, Schoharie County, New York, did not identify the NTSB as a participant. Not only was this search warrant not

dispositive based upon the NTSB's independent authority, but I believe the oversight could have been cured. The NTSB's statutory authority allows it to "...enter property where a transportation accident has occurred or wreckage from the accident is located and do anything necessary to conduct an investigation...." 49 U.S.C. 1134(a)(1). Additionally, because you felt legally bound by the search warrant, it could have been amended. You were concerned about contacting Judge Bartlett on a Sunday, however, recall that the NTSB did not receive the directive that it could not participate in the vehicle examination until late Saturday evening. Thus, we had no opportunity to pursue another remedy during normal business hours. Ultimately, you permitted the NTSB investigators to stand approximately 15 feet away from the vehicle during the forensic exam. There was no interaction with the examiner and the NTSB investigators often could not see the work being done.

Further, you stated that the NTSB would not have access to the vehicle until after the forensic exam, after any other work that the NYSP wished to complete, after review by the defense counsel, and after the exam by the defense counsel's expert. You could provide no timeframe for the completion of these reviews, other than you expected it would be soon. In a letter you sent to the defense counsel dated October 16, 2018, you asked the defense counsel to identify a date near the end of the month when it might review the vehicle. That means at least two weeks will pass with the vehicle sitting idle and valuable safety evidence eroding.

I understand that you do not want to compromise your criminal investigation, and therefore, you have structured your cooperation with the NTSB investigation with only that in mind. However, this resistance to the NTSB investigation of the limousine accident is perplexing in light of our Congressional mandate and the NTSB mission, and it is not a satisfactory situation for NTSB. You are looking for the potential evidence of a crime. The NTSB is concerned with different evidence, or a different look at that evidence, when looking for safety issues to prevent future accidents. Moreover, our inability to garner immediate access to the vehicle permanently impairs our ability to establish the facts and circumstances relevant to safety issues.

Nonetheless, I do believe we may work together to ensure both of our investigations are thorough and accurate. The NTSB asks that you and/or the NYSP provide the following to the NTSB's investigative team:

- Appropriate storage of the vehicle to protect its integrity (especially mitigating the impact of the weather). I understand that, as of yesterday, the NYSP has continued the rental agreement that the NTSB began for the tent. Additionally, the NYSP is searching for an indoor facility.
- Appropriate storage of all parts removed from the vehicle to maintain their integrity. I understand that the parts have been placed in the NYSP evidence system and will be maintained indoors.
- Immediate access to the vehicle, or at a minimum, coordinated access when NYSP and/or the defense team access the vehicle.
  - The NTSB is particularly interested in the occupiable space inside of the vehicle, the structural modifications used to lengthen the vehicle's wheelbase and increase its occupancy, the powertrain components, the steering and brake systems.

- I understand that the NYSP does not object to the NTSB being present when the defense/defense expert examine the vehicle.
- Investigative documentation obtained by the NYSP that has not been shared with the NTSB
  - Thank you for providing copies of the information of the scene collected by the drone(s).
  - NYSP has provided next of kin information.
  - I understand that the New York Department of Transportation reports are under review by the NYDOT Counsel's office, and it will be in contact with the NTSB investigative team about releasing the reports.
- An unredacted copy of [REDACTED] report(s) and photographs or video taken during his examination.

The NTSB will continue to cooperate with the NYSP and you throughout this accident investigation. If you believe or learn otherwise, contact me immediately. I look forward to your response and a resolution to our current impasse. I am confident that we may have a productive investigative relationship.

Sincerely,



Kathleen Silbaugh  
General Counsel

Enclosure

## **Background on NTSB highway authority and criminal investigations**

The NTSB commenced operations in 1967 as an independent agency located with the Department of Transportation to investigate accidents in all modes of transportation, to report on their facts, circumstances, and probable cause, and to make remedial safety recommendations to prevent accidents. NTSB investigations are non-adversarial proceedings and are not conducted for the purpose of determining the rights or liabilities of any person. 49 C.F.R. §831.4. The NTSB is not a regulatory agency in the conventional sense - it does not promulgate operating regulations and does not certificate organizations or individuals. The goal of our work is to foster safety improvements, through formal and informal safety recommendation for the traveling public. Pub. L. 89-67; 80 Stat. 935. In 1975, Congress made NTSB a completely independent establishment of government, and its duties, particularly in the surface mode of transportation, were considerably expanded. Pub. L. 93-633; 88 Stat. 2156.

In order to fulfill its responsibilities, Congress granted the NTSB extraordinary powers and repeatedly enlarged and strengthened the NTSB's authority. For example, NTSB has statutory authority to enter any property where an accident has occurred or wreckage is located and "do anything necessary to conduct an investigation," order autopsies of persons who die in transportation accidents, "inspect any record, process, control, or facility related to an accident investigation," and examine or test, among other things any vehicle involved in an accident. 49 U.S.C. §1134.

The NTSB garnered well-earned respect for its investigative abilities, and safety recommendations, and we are experienced with working with other agencies when criminal or other parallel investigations are being conducted. In an opinion authored by the Chief Judge of the D.C. Circuit, the Court characterized the broad powers of the NTSB and its exercise of that authority as follows:

NTSB is a uniquely independent federal agency.... Congress has endowed the NTSB with broad powers to accomplish its missions, because the work of the agency is viewed as extremely important. See S REP. NO. 101-450, at 2 (1990) ("The NTSB's mission ... is critical.") .... Most importantly, the Board's investigations have "priority over any investigation by another department, agency, or instrumentality of the United States Government." 49 U.S.C. §1131(a)2 (1994). The Board has used these broad powers wisely, achieving notable successes in its work and receiving high praise for the integrity of its investigative processes. See S. REP. NO. 104-324, at (1996) (The Safety Board's reputation for impartiality and thoroughness has enabled it to achieve such success in shaping transportation safety improvements that more than 80 percent of its recommendations have been implemented.").

Chiron Corp. v. National Transp. Safety Board 198 F.3d 935 at 937 (D.C. Cir. 1999).

Moreover, many of our highway investigators are former law enforcement officers, and our investigative staff is experienced in working with other agencies when criminal or other parallel investigations are being conducted and our senior officials are also very sensitive to such needs.

The NTSB has a distinguished record of contributing to highway safety for decades. For example, as a result of the NTSB's investigative work and safety recommendations, automobile airbags for all citizens are safer, child fitting stations are available nationwide, and graduated driver licensing programs for teenagers have been implemented nearly all states. Additional examples of safety improvements inspired by or resulting from investigations or resulting from investigations or recommendations of the NTSB include improvements in the design and construction of school buses, highway barrier improvements, and center high-mounted rear brakes lights on automobiles. Although there is no way to quantify the accidents that did not happen or the lives that were not lost because of the efforts of the NTSB, the tangible safety improvements that can be directly associated with the work of the NTSB have saved countless lives and avoided millions and perhaps billions of dollars in injuries and property damage.

The jurisdictional mandate for NTSB investigations in the highway mode reads: "The National Transportation Safety Board shall investigate or have investigated (in detail the Board prescribes) and establish the facts, circumstances, and cause or probable cause of ... a highway accident, including a railroad grade crossing accident, the Board selects in cooperation with a State[.]" 49 U.S.C. §1131(a)(1)(B). There is no legislative history on the meaning of "in cooperation with the states," but it has long been interpreted by NTSB to be merely a recognition that NTSB will necessarily have to pick and choose accidents that it thinks have national importance. It cannot, nor should it, investigate the tens of thousands that occur every year; and that because, unlike the other modes NTSB investigates, it is the individual states who are largely responsible for the regulation of operators and enforcement of traffic safety, NTSB will necessarily need to coordinate its exercise of investigative authority with those agencies who would routinely respond to an accident whether or not NTSB was present.

It should be noted that the operative jurisdictional language clearly indicates that *the Board* selects the accidents it investigates. In other words, the jurisdictional phrase "in cooperation with a State" does not grant New York, or any other state, mutual input regarding an NTSB decision about whether to investigate a particular highway accident.<sup>1</sup> This concept – that the phrase "cooperation with" imparts an obligation to make a good faith consultation, but does not create a mutual "veto" over a particular course of action – can also be seen in the statutory language used in our surface testing authority. Our statute requires that such testing "to the maximum extent feasible, preserves evidence related to the accident, consistent with the needs of the investigation and with the cooperation of that owner or operator." See 49 U.S.C. §1134(c)(2). From the legislative history, it is clear that the phrase "with the cooperation of that owner or operator" does not impart upon those parties the power to control NTSB decision-making regarding an accident investigation. The legislative history emphasizes that the owner's interests do not trump NTSB's need and cannot be used to delay the inquiry.

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<sup>1</sup> It would also be counterproductive to safety to confer on states veto rights over NTSB's choices of which accidents to pursue. States may be facing potential litigation stemming from their action or inaction or want to avoid adverse publicity from NTSB's conclusions and probable cause determinations. States could thus thwart legitimate inquiries for selfish reasons unrelated to transportation safety.

The provision specifying the cooperation of the owner or operator has been added to the law in an attempt to create an atmosphere of cooperation between the investigating agencies and the owner or operator and to prevent unnecessary litigation of these issues. If, however, arrangements cannot be worked out, the NTSB has the authority to secure an immediate court order as necessary to obtain evidence and conduct examinations or test. Thus, consent of the owner is not a precondition to NTSB conducting examinations or tests consistent with the needs of the investigation.

H.R. REP. NO. 970108, Part II, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3 (1981), reprinted in 1981 U.S.C.C.A.N. 1736-37. Presumptively, given Congress's previous use of the exact same language ("cooperation with a State" and "cooperation of that owner or operator"), it did not intend for our highway jurisdiction, and associated statutory authority, to be usurped or compromised by state officials.<sup>2</sup> The Board does not seek priority over states in highway investigations, but it is at least entitled to parity for needed evidence.

NYSP and the District Attorney's actions (i.e., barring an NTSB investigation and refusing to cooperate to find mutually satisfactory methods to permit NTSB to go forward while providing adequate protection for any potential criminal prosecution that may stem from the accident) are not consistent with Article VI of the United States Constitution, which states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2; see also Nash v. Florida Industrial Commission, 389 U.S. 235, 239-240 (1967) ("The action of Florida here .... has a direct tendency to frustrate the purpose of Congress.... Florida should not be permitted to defeat or handicap a valid national objective.")

In fact, the California Attorney General, in response to California Highway Patrol (CHP) questions, issued a formal opinion on this very issue. The 1979 opinion by then-California Attorney General George Deukmejian concluded that CHP cannot by law

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<sup>2</sup> This concept is also similar to the provisions in our statute addressing when investigative priority will be ceded to the Federal Bureau of Investigation. See 49 U.S.C. § 1131(a)(2)(B) ("If the Attorney General, in consultation with the Chairman of the Board, determines and notifies the Board that circumstances reasonably indicate that the accident may have been caused by an intentional criminal act, the Board shall relinquish investigative priority to the Federal Bureau of Investigation....") There is an obligation to make a good-faith consultation, but the decision is still that of one agency.'

prevent NTSB from conducting a safety investigation or bar it from the scene: “[a] general principle arising from the supremacy clause is that a state may not impede a federal agent in the fulfillment of his duties imposed by federal law.” A copy of the Opinion is attached.

OFFICE OF THE ATTORNEY GENERAL  
State of California

GEORGE DEUKMEJIAN  
Attorney General

MARCH 30, 1979

IL 79-37

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OPINION

of

GEORGE DEUKMEJIAN  
Attorney General

VICTOR D. SONENBERG  
Deputy Attorney General  
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Formerly <sup>Op</sup> Op. 78/78  
No. CV 78/78

THE HONORABLE G. B. CRAIG, COMMISSIONER, CALIFORNIA  
HIGHWAY PATROL, has requested an opinion on the following  
questions:

1. Can the California Highway Patrol accept or  
reject National Transportation Safety Board assistance at  
accident scenes for which the California Highway Patrol is  
the primary investigating agency?

2. Can the California Highway Patrol refuse to  
allow any governmental entity or private organization access  
to a traffic collision scene and/or involved vehicles while  
securing evidence to support criminal prosecution?

The conclusions are:

1. There is nothing in the law which compels the  
highway patrol to accept or reject National Transportation  
Safety Board assistance at accident scenes. However, the highway  
patrol does not have the power to bar employees of the National  
Transportation Safety Board from the scene of accidents which  
the Board has selected for investigation.

2. The California Highway Patrol may not exclude  
governmental entities with parallel traffic enforcement jurisdic-  
tion from a traffic collision scene, and from the involved  
vehicles, except on certain areas of state freeways or in  
those areas where it has exclusive police jurisdiction. How-  
ever, the highway patrol, where required by the necessities  
of the accident investigation, may so exclude all other  
governmental entities and private organizations.

## ANALYSIS

The National Transportation Safety Board (hereafter NTSB) is an independent agency of the federal government (49 U.S.C. § 1902(a)).

Under the Independent Safety Board Act of 1974 (49 U.S.C. §§ 1901 - 1907) the essential functions of the NTSB are to investigate transportation accidents (49 U.S.C. §§ 1902(b)(5), 1903(a)), including highway accidents (49 U.S.C. § 1903(a)(1)(B)), determine their causes (49 U.S.C. § 1903(a)) and make recommendations to federal, state and local authorities for action that will promote the reduction of similar accidents (49 U.S.C. §§ 1903(a)(3), 1904(2)). (See also 49 C.F.R. § 800.3(a).) The NTSB is also directed to initiate special studies and investigations on matters pertaining to transportation safety and avoidance of injuries (49 U.S.C. § 1903(a)(4)), to assess accident investigation methods and publish recommended methods (49 U.S.C. § 1903(a)(5)), and to prepare an annual report to Congress with a detailed appraisal of the accident investigating and prevention activities of federal and state agencies (49 U.S.C. § 1904(3)).

It can thus be seen that the federal government, acting through the NTSB, has a substantial investigatory interest in highway accidents with the significant objective of gathering information to reduce injuries and improve highway safety. Thus to the extent that the present question contemplates the California Highway Patrol's rejection of NTSB participation in an investigation of highway accidents, a consideration of the supremacy clause of the United States Constitution (art. VI, cl. 2) is required. 1/ This clause provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

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1. The present question literally asks whether the highway patrol "can accept or reject [NTSB] assistance at accident scenes . . . ." We are unaware of any provision of law that either requires or prevents the highway patrol from accepting NTSB assistance in the conduct of its accident investigations. However, the entire context of the opinion request indicates that what is at issue is not the question of accepting or rejecting assistance, but whether the highway patrol has the authority to bar the NTSB from access to an accident scene where the highway patrol is conducting an investigation. Our reply will be directed to this issue.

clause is that a state may not impede a federal agent in the fulfillment of his duties imposed by federal law. (Wash v. Florida Industrial Comm'n (1967) 389 U.S. 235, 239-240; In re Heagle (1990) 135 U.S. 1, 62, 75-76; 57 Ops. Cal. Atty. Gen. 42, 44 (1974); Tribe, American Constitutional Law (1975) p. 393.)

In the present situation the federal statute authorizes NTSB investigators "to enter any property wherein a transportation accident has occurred . . . and do all things therein necessary for a proper investigation . . . ." (49 U.S.C. § 1903(b)(2).) If, nonetheless, the NTSB could be excluded at the discretion of a state agency from access to the scene of a highway accident which the NTSB had selected for investigation, the fulfillment of the cardinal public safety objectives of the federal law would clearly be thwarted by such state action. As stated in Wash v. Florida Industrial Comm'n, supra, 389 U.S. at p. 240: "a state law cannot stand that either frustrates or impairs the efficiency of those agencies of the Federal government to discharge the duties, for the performance of which they were created." Thus it has been held that the State of Arizona could not compel a federal agency to submit plans for a dam it intended to construct to the state engineer for prior approval. (Arizona v. California (1931) 283 U.S. 423, 451-542.) Following the same principle, it was held that the State of Maryland could not compel a post office employee to obtain a state driver's license before driving a post office truck. (Johnson v. Maryland (1920) 254 U.S. 51, 55-57.) Similarly in United States v. City of Chester (1944) 144 F.2d 415, 420, it was held that a federal agency in constructing emergency defense housing could not be required to comply with municipal building ordinances. See also Mayo v. United States (1943) 319 U.S. 441, 447-448.

With respect to the present situation we therefore conclude that by virtue of the Constitution's supremacy clause the California Highway Patrol may not restrict the NTSB from access to the scene of a highway accident.

But in so concluding we note that the federal statute directs that the highway accidents to be investigated are to be selected by the NTSB "in cooperation with the States." (49 U.S.C. § 1903(a)(1)(B).) (See also 49 C.F.R. § 800.3(a).) Thus while an NTSB investigation cannot be precluded by the state, the NTSB is obligated to consult with and consider the pertinent interests of the state in the process of selecting highway accidents for investigation. In this connection we are informed by the highway patrol and the NTSB that a general policy of cooperation between these two agencies is presently operative.

We next consider the question of whether the highway patrol can bar any governmental entity (other than the NTSB) or any private organization from an accident scene while the highway patrol is securing evidence relating to criminal charges.

Considering this question requires, initially, a specification of the statutes delineating the highway patrol's law enforcement jurisdiction.

Vehicle Code section 2400 provides that the Commissioner of the highway patrol "shall enforce all laws regulating the operation of vehicles and the use of the highways . . .", and Vehicle Code section 2401 directs the Commissioner to provide at all times for the "patrol of the highways."

Vehicle Code section 2409 and Penal Code section 830.2 afford to highway patrol officers "the powers of a peace officer" primarily to enforce the laws relating to the operation of vehicles upon the highways.

Vehicle Code section 2412 authorizes all highway patrol officers to investigate accidents and gather evidence for the purposes of criminal prosecution arising out of such accidents.

Thus the jurisdiction of the highway patrol to enforce the laws on highways throughout the state and to conduct investigations in connection with such law enforcement is clearly established. But what is most significant in relation to the present question is that this jurisdiction is not exclusive. It is shared with the other police agencies throughout the state. (See California Traffic Law Administration 12 Stan. L. Rev. 388, 392-394 (1960) commenting upon the broad overlap of jurisdictions of the state's various police agencies in the field of traffic law enforcement.) Thus county sheriffs by virtue of their general law enforcement authority (Gov. Code §§ 26600-26604) have authority, which parallels that of the highway patrol, to investigate Vehicle Code violations. (36 Ops. Cal. Atty. Gen. 198 (1960).) In McCorkle v. City of Los Angeles (1969) 70 Cal.2d 252, 261-263, the Supreme Court recognized the authority of city police officers to investigate traffic accidents, and concluded that such officers, while conducting such investigations, are "traffic officers" as defined by Vehicle Code section 625 and are such within the meaning of Vehicle Code section 2800 which requires obedience to the orders and directions of a "traffic officer." (See also Pen. Code § 830.1 and Gov. Code §§ 41601, 41602 conferring upon city police virtually the same law enforcement authority that is possessed by sheriffs. And note that the

Vehicle Code's definition of "traffic officer" applies not only to members of the highway patrol but also to "any peace officer who is on duty for the exclusive or main purpose of enforcing . . . [the accident and traffic provisions of the Vehicle Code]." Veh. Code § 625 (emphasis added).

However, within this framework of parallel jurisdiction there are, with two limited exceptions, no provisions establishing jurisdictional priorities which would give one police agency authority over another in those situations where more than one agency is responding to the same incident.

The first exception involves the "facilities of travel" of bridge and highway districts. Here Streets and Highways Code section 27177 grants to the highway patrol "exclusive" police jurisdiction. Thus by its terms this provision authorizes the highway patrol to exclude other police agencies from conducting enforcement activities on district travel facilities. (See City of Nevada v. Bastow (1959) 328 S.W.2d 45, 47 which defines the word "exclusive" to mean "possessed to the exclusion of others; . . . debarred from participation or enjoyment; not including, admitting, or pertaining to any other . . . .")

The other exception involves state freeways within city limits (other than those within the City of Los Angeles). On such areas of the freeways section 2400 of the Vehicle Code provides that the highway patrol shall have "primary jurisdiction for the administration and enforcement of . . . [traffic] laws, and for the investigation of traffic accidents. . . ." (Emphasis added.) On the other hand, this same section provides that "city police officers while engaged primarily in general law enforcement duties may incidentally enforce state and local traffic laws and ordinances on state freeways." (Emphasis added; Veh. Code § 2400.) This assigning of "primary jurisdiction" to the Highway Patrol and "incidental[]" authority to the city police clearly indicates that the highway patrol is to be the predominant traffic enforcement authority in the specified areas of the state freeways. Vehicle Code section 2400 thus confers upon the highway patrol, in these particular areas, authority to control accident investigations and restrict, where necessary, the access of other police agencies to the accident scene and to the involved vehicles.

However, the fact that the Legislature has expressly specified those instances where the highway patrol is to have superseding authority in traffic law enforcement over police agencies that also have traffic enforcement jurisdiction, requires the conclusion that in all other instances the highway patrol does not have this authority over such police agencies.

As stated by the Supreme Court in Wildlife Alive v. Chickering (1976) 13 Cal.3d 190, 196:

"In the grants [of powers] and in the regulation of the mode of exercise, there is an implied negative; an implication that no other than the expressly granted power passes by the grant; that it is to be exercised only in the prescribed mode . . . ."

Thus if the highway patrol desires to exclude other police agencies from an accident scene in those situations where its authority to take this action is not specified by statute, such exclusion would have to be based upon cooperative agreements worked out between the highway patrol and the other agencies. (See 15 Ops. Cal. Atty. Gen. 129, 130 (1950).)

There still remains, however, the question of the highway patrols' authority to exclude from the accident scene persons from governmental agencies which do not have parallel enforcement jurisdiction, and persons from private organizations.

Pertinent to the highway patrol officer's authority when conducting an accident investigation is Vehicle Code section 2800 which makes it unlawful "to willfully fail or refuse to comply with any lawful order, signal, or direction of any traffic officer . . . ." and Penal Code section 148 which prohibits anyone from "willfully resist[ing], delay[ing] or obstruct[ing] any public officer, in the discharge or attempt to discharge any duty of his office . . . ." (See also Pen. Code § 69.)

As already noted, investigating accidents and gathering evidence is one of the duties of the highway patrol expressly designated by statute. (Veh. Code § 2412.) Thus the above specified Vehicle and Penal Code provisions which prohibit obstructing an officer in the performance of his duties, and which require obedience to his directions, would appear to afford the highway patrol ample authority to exclude any persons, whether they represent private organizations or governmental agencies (without parallel enforcement jurisdiction), from access to an accident scene and from access to the involved vehicles, when such exclusion is necessary to prevent obstruction of the investigatory and evidence gathering process. (See In Re William F. (1974) 11 Cal. 3d 249, 251-253; Los Angeles Free Press, Inc. v. City of Los Angeles (1970) 9 Cal. App. 3d 448, 455, 457.)

In so concluding we are aware of Penal Code section 409.5 which authorizes highway patrol and other specified peace officers to close off areas where accidents or other disasters have created a menace to the public

health and safety (see also Veh. Code § 2812), and we note that this section also provides that "[n]othing in this section shall prevent a duly authorized representative of any news service, newspaper, or radio or television station or network from entering the areas closed pursuant to this section." (Pen. Code § 409.5(d).)

This proviso exempting news reporters from the otherwise applicable access restrictions of Penal Code section 409.5 gives rise to the question of whether news reporters constitute an exception to an officer's authority to exclude persons from private organizations from the scene where an investigation is being conducted.

In considering this question we note first that the news reporter's exemption of Penal Code section 409.5 applies when the scene is closed by peace officers "pursuant to this section." (Pen. Code § 409.5(d).) Therefore, by its express terms, the exemption is not applicable when peace officers close an area pursuant to some other section.

Also, the phrase that "nothing in this section shall prevent . . . [a news reporter from entering the closed areas]" is a further indication in the proviso that the reporter's exemption is not to apply to access restrictions which are based on other statutory sections. Thus, for example, if within a restricted disaster area, highway patrol officers, pursuant to their law enforcement and investigative authority under the Vehicle Code (§§ 2400, 2409, 2412), closed off a smaller area to protect the integrity of a criminal investigation, Penal Code section 409.5 would not afford a reporter access to such investigative area because the closure of such area was not based upon that section. See Los Angeles Free Press, Inc. v. City of Los Angeles, supra, 9 Cal.App.3d at 455-457, which, while noting Penal Code section 409.5, recognized the authority of peace officers to place restrictions upon the access of news reporters to the scenes of crimes and disasters.

A similar question concerning the authority of police officers to restrict access to an investigative scene is raised by Penal Code section 402 which provides:

"Every person who goes to the scene of a disaster, or stops at the scene of a disaster, for the purpose of viewing the scene or the activities of policemen, firemen, other emergency personnel, or military personnel coping with the disaster in the course of their duties during the time it is necessary for emergency vehicles or such personnel to be at the scene of the disaster or to be moving to or from the scene of the disaster for the purpose of protecting lives or property, unless it is part of the duties of such person's employment to view such scene or activities, and thereby impedes such policemen, firemen, emergency personnel

or military personnel in the performance of their duties in coping with the disaster, is guilty of a misdemeanor."

"For the purposes of this section, a disaster includes a fire, explosion, an airplane crash, flooding, windstorm damage, a railroad accident, or a traffic accident."  
(Emphasis added.)

Thus if a person's employment duties require him to view a disaster scene, the proviso in Penal Code section 402 exempts him from the restrictions of that section. However, it should be noted that Penal Code section 402 is expressly directed to protecting against impediment, the performances of those duties that are related to "coping with . . . disaster[s]". That section is not directed to the protection of the performance of other types of official duties, unlike Penal Code section 148 which, in prohibiting the willful obstruction of a public officer in the discharge of his duties, is not confined in applicability to any particular type of official duty. Thus, because of the express qualification in the terms of Penal Code section 402, if an officer restricts access to a particular area in order to permit the effective conduct of a criminal investigation, as opposed to "coping with [a] . . . disaster," the provisions of Penal Code section 402 would not be applicable. As stated in Hurst v. City and County of San Francisco (1944) 33 Cal.2d 293, 301: "a proviso, that is, an exception . . . should not be construed to limit the general power except to the extent that it clearly does so." See also People ex rel S.F. Bay etc. Cor. v. Town of Emeryville (1968) 69 Cal.2d 533, 543; Johnson v. Board of Supervisors (1929) 208 Cal. 232, 285. There appears to be no basis in the terms of either Penal Code sections 402 or 409.5 for extending the exceptions to the access restrictions contained in these statutes to situations which these statutes do not specify.

Thus we conclude that the exceptions in Penal Code sections 402 and 409.5 do not limit the authority of the highway patrol to restrict the access of persons from private organizations to an accident scene where a criminal investigation is being conducted.