

The following memo is to assist law enforcement, newsrooms, and other interested parties adhere to California Penal Code §409.7 (created by Senate Bill 98), pertaining to the rights and privileges of journalists as they cover demonstrations and other First Amendment-protected activities.

During the legislative process and since the passage, multiple law enforcement entities have asked who qualifies as a journalist, or specifically who qualifies as a “duly authorized representative” under the new law. The memo answers these questions, and a number of related ones, based on statutes and case law.

The memo has been written, advised, and/or supported by the following attorneys, who regularly practice First Amendment and media law:

- Susan Seager, Adjunct Clinical Professor of Law, UC Irvine Law School (principal author)
- Peter Eliasberg, Chief Counsel/Manheim Family Attorney for First Amendment Rights, ACLU Foundation of Southern California
- Zoë McKinney, Staff Attorney, ACLU Foundation of Southern California
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- Brittny Barsotti, General Counsel, California News Publishers Association
- David Snyder, Executive Director, First Amendment Coalition
- Mickey H. Osterreicher, General Counsel, National Press Photographers Association

Along with a broad coalition of journalist associations and labor unions, many of these attorneys were also involved with passage of Senate Bill 98 and gained unique perspective on the legislature’s intent. The memo was completed November 3, 2021. Several of the coalition organizations have endorsed the memo as of November 10, 2021:

- Asian American Journalist Association, Los Angeles
- California News Publishers Association
- Californians Aware
- First Amendment Coalition
- Los Angeles Press Club
- Media Alliance
- Media Guild of the West, The NewsGuild-CWA Local 39213
- National Association of Black Journalists of Los Angeles
- National Association of Hispanic Journalists
- National Press Photographers Association
- National Writers Union
- Online News Association Los Angeles
- Pacific Media Workers Guild
- Radio Television Digital News Association
- Society of Professional Journalists, Los Angeles

Definition of Protected Journalist for Penal Code Section 409.7(a)

California Penal Code section 409.7(a)(1) provides that:

- “[a] **duly authorized representative of any**
- **news service,**
- **online news service,**
- **newspaper, or**
- **radio or television station or network**
- may enter the closed areas described in this section... [as:]
- the immediate area surrounding any emergency field command post or any other command post, or establish a police line, or rolling closure at a demonstration, march, protest, or rally where individuals are engaged in activity that is protected pursuant to the First Amendment to the United States Constitution or Article I of the California Constitution[.]”

I. Journalists Covered by Section 409.7(a)

A. Who Is a “Duly Authorized Representative”?

- A “duly authorized representative” is someone who has been “duly authorized” by a covered news organization to go to the scene and report about the event for the news organization.

B. Is the Journalist Required to Be on Staff or Permanent News Employee?

- No. The statute does not contain any language requiring the journalist to be a staff writer, permanent news organization employee, or working on assignment from a particular news organization to be protected by the statute.

C. What Types of Journalist Identification Will Suffice?

- News organization employee identification, such as a badge, ID, business card, and the like
- Press credentials or Member IDs issued by press trade groups such as Los Angeles Press Club and National Press Photographers Association
- Letters of assignment for freelancers on news organization letterhead
- Credentials for journalism majors and school news publications or websites at an Accredited secondary school, community college, university, or college

- Request by journalist that officer call news organization editor or review news organization website to verify journalist’s byline
- Local law enforcement press credentials (but not required)
- Out-of-state law enforcement press credentials

This list is guided by the written policy of the Los Angeles Sheriff’s Department, the largest sheriff’s department in the nation, and a memo from the Los Angeles Police Department, one of the largest police departments in California.

Both agencies require officers to recognize journalists even if the journalists do not have press credentials issued by those respective agencies.

The Los Angeles Sheriff’s Department *Manual of Policy and Procedures* provides that “[c]redentials issued by the representative’s agency or employer shall ... be honored.” Los Angeles Sheriff’s Department *Manual of Policy and Procedures*, Field Operations Directive, 20-21 Press Pass Identification. (“Credentials issued by the representative’s agency or employer shall also be honored.”) See <http://pars.lasd.org/Viewer/Manuals/15183/Content/16296>

Similarly, Los Angeles Police Department Deputy Chief of Staff Dominic N. Choi sent an internal memo to all personnel on October 30, 2020 stating: “[t]he intent of this message is to remind supervisors and line personnel that the Department WILL recognize individuals who self-Identify as media representatives and will NOT require specific media credentials.”

The memo further states that “officers can ask individuals who identify themselves as a member of the media for identification from the organization they represent, which may consist of a”

- “business card” or
- “company ID”
- “[But] *the inability to produce identification does not preclude an individual from acting as a member of the media.*” (emphasis in original). (LAPD Memo attached as Exhibit A.)

This list of journalist identification methods is also guided by section 409.7(a)(3), which provides that “[i]f the duly authorized representative is detained by a peace officer or other law enforcement officer, that representative shall be permitted to contact a supervisory officer immediately for the purpose of challenging the detention, unless circumstances make it impossible to do so.”

Additional guidance in identifying a journalist paraphrased from language in two federal court orders:

To facilitate the...identification of Journalists...the following shall be considered indicia of being a Journalist: visual identification as a member of the press, such as by *carrying a professional or authorized press pass, carrying professional gear such as professional photographic equipment, or wearing a professional or*

authorized press badge or other official press credentials, or distinctive clothing, that identifies the wearer as a member of the press.... These indicia are not exclusive[.] [Law enforcement officials] shall not be liable for unintentional violations of this Order in the case of an individual who does not carry or wear a press pass, badge, or other official press credential, professional gear, or distinctive clothing that identifies the person as a member of the press.

Index Newspapers LLC v. City of Portland, 480 F. Supp. 3d 1120, 1156 (D. Or. 2020) (emphasis added); *Goyette v. City of Minneapolis*, Case No. 20-cv-1302, 2021 WL 5003065, at *16 (WMW/DTS) (D. Minn. Oct. 28, 2021).

These examples of acceptable journalist modes of identification also are based on widely accepted journalism/industry/publication practices in California and across the country and on examples featured in various trainings for police officers and police public information officers.

D. Are Local Law Enforcement Press Credentials Required?

- No. The statute does not contain any language requiring the journalist to have a law enforcement agency press credential, local or otherwise. Moreover, many law enforcement groups have ceased the practice of credentialing journalists, making it impossible to obtain media credentials in many local jurisdictions.

E. Does Journalist Need to Be “Duly Authorized” by Local Law Enforcement to Stay After an Unlawful Assembly Is Declared or Order to Disperse?

- No. The journalist does not need permission from local law enforcement.

In 1984, the California Attorney General analyzed the companion reporter’s privilege provided by Penal Code section 409.5(d), which allows a “duly authorized representative” of a media organization to go behind police lines in natural disasters.

The Attorney General concluded that “it is apparent that the phrase ‘duly authorized’ refers to the news station, newspaper, or radio or television station or network having ‘duly authorized’ the individual to be its representative at the site.” 67 Ops. Cal. Atty. Gen. 535, 1984 WL 162111 *4 (1984). The Attorney General “reject[ed] the argument that the ‘duly authorized’ news media exception refers to someone authorized to be in the area by the law enforcement officer.” *Id.*

The Attorney General explained that requiring journalists to obtain permission from law enforcement officials to go behind police lines in natural disasters would render the 409.5(d) privilege “superfluous” – that is, meaningless. *Id.* “In general, then, news media representatives may not be denied access to a disaster site under section 409.5.” *Id.*

https://oag.ca.gov/system/files/opinions/pdfs/84-802_0.pdf

II. News Organizations Protected by the Law

A. Which News Organizations Can Send Protected Journalists?

- The statute provides that “a news service, online news service, newspaper, a radio or television station or network” can send a “duly authorized representative” who will be protected by the statute.

Section 409.7(a)(1) does not provide a definition of a “news service, online news service, newspaper, or radio or television station or network.” But six of those seven categories – a “news service, ... newspaper, [and] radio or television station or network” – have been listed for decades in section 409.5(d) and are defined by dictionaries and other sources as follows:

- A “**news service**” is defined by dictionary.com as “an agency that gathers news stories for its members or subscribers.” The Associated Press (AP) is an example of a news service.
- A “**newspaper**” is defined by California Labor code section 2783(h)(2)(A) as: “a newspaper of general circulation, as defined in Section 6000 or 6008 of the Government Code, and any other publication circulated to the community in general as an extension of or substitute for that newspaper’s own publication, whether that publication be designated a ‘shoppers’ guide,’ as a zoned edition, or otherwise” and “a publication that is published in print and that may be posted in a digital format, and distributed periodically at daily, weekly, or other short intervals, for the dissemination of news of a general or local character and of a general or local interest.” A “**newspaper**” is defined by dictionary.com as “a printed publication issued at regular and usually close intervals, especially daily or weekly, and commonly containing news, comment, features, and advertising” and “an online version of a newspaper.”
- “[A] **radio ... station**” is defined by dictionary.com as “an installation consisting of one or more transmitters or receivers” and as “a broadcasting organization.”
- “[A] **radio ... network**” is defined by Wikipedia as “a network system which distributes programming to multiple [radio] stations.”
- “[A] **television station**” is defined by Wikipedia as “a station which broadcasts structured content to an audience.”
- “[A] **television ... network**” is defined by Wikipedia as “a telecommunications network for distribution of television program content, where a central operation provides programming to many television stations or pay television providers.”

B. What Qualifies as an “Online News Service?”

- An “**online news service**” is defined by Oxford Reference as “[a] Web site which provides news on a basis which is close to real time[.]”

An “online news service” is the only new category of a privileged news outlet listed in section 409.7(a) that does not appear in section 409.5(d).

The California Court of Appeal provides guidance on the definition of an “online news service” in *O’Grady v. Superior Court*, 139 Cal. App. 4th 1423 (2006). *See*

In that case, the court was required to decide whether the website, “O’Grady’s PowerPage,” which was “devoted to news and information about Apple Macintosh computers and compatible software and hardware” and “publishe[d] 15 to 20 items per week,” qualified for the California “reporter’s shield law” privilege protecting journalists from court-ordered identification of anonymous sources and unpublished materials. *Id.* at 1432.

The California Constitution, art. I, sec. 2(a), and California Evidence Code section 1070 provide that the state’s reporter’s shield law applies to: “[a] publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed” and to “a radio or television news reporter or other person connected with or employed by a radio or television station[.]”

The court concluded the definition of a journalist under the shield law applied to “O’Grady’s PowerPage” website because its “operated enterprises whose raison d’etre was the dissemination of a particular kind of information to an interested readership. ... the point here is that such conduct constitutes the gathering and dissemination of news, as that phrase must be understood and applied under our shield law.” *Id.* at 1458. “It is established without contradiction that [the website journalists] gather, select, and prepare, for purposes of publication to a mass audience, information about current events of interest and concern to that audience.” *Id.* at 1467.

In *O’Grady*, the court also found that the website qualified for protection under the shield law because it published news periodically, albeit irregularly, and the Legislature “intended” journalist’s shield law “to include all ongoing, recurring news publications.” *Id.* at 1467.

Other courts have held that the California reporter’s shield law covers freelance writers, *People v. Von Villas*, 10 Cal. App. 4th 201, 233 (1992); *Playboy Enters., Inc. v. Superior Court*, 154 Cal. App. 3d 14, 21, 27-28 (1984).

Thus, based on this broad definition of journalists protected by the shield law, “online news services” easily include news websites created by legacy print newspapers, television networks, and cable television networks, including, but not limited to, the *Los Angeles Times* (<https://www.latimes.com/>); *The Epoch Times* (<https://www.theepochtimes.com/>); *New York Times* (<https://www.nytimes.com/>); SFGATE (<https://www.sfgate.com/>); NBC News (<https://www.nbcnews.com/>); CNN (<https://www.cnn.com/>); and FOX News (<https://www.foxnews.com/>).

“Online news services” also include newer, independent news websites operating in California, such as Knock LA (<https://knock-la.com/>); L.A. Taco (<https://www.lataco.com/>); Open Vallejo (<https://openvallejo.org/>); and Voice of OC (<https://voiceofoc.org/>) also qualify as online news services.

The *O'Grady* decision also means that section 409.7(a) also extends to individuals to who have established their own “news service, online news service, newspaper, or radio or television station or network” and uses their outlet to “gather, select, and prepare, for purposes of publication to a mass audience, information about current events of interest and concern to that audience” on a periodic basis can also designate themselves as a “duly authorized representative” of their news outlet. 139 Cal. App. 4th at 1467. In other words, this statute can cover certain solo journalists.

C. Is Journalist Required to Regularly Report about Police or Fire News to Qualify for the Section 409.7(a) Privilege?

- No. The statute expands the journalist’s privilege to go behind police lines in two ways: (1) the privilege applies to journalists covering public demonstrations and other exercises of First Amendment rights, which is not the same as reporting about natural disasters, police, and fires; and (2) the statute expands protected news outlets to include “online news services.”

The Court of Appeal decision in *Los Angeles Free Press, Inc. v. City of Los Angeles*, 9 Cal. App. 3d 448 (1970), does not apply to section 409.7(a). That 1970 case interprets the journalist’s “privilege” provided by section 409.5(d) (*id.* at 456), which is significantly different from the journalist’s privilege added this year in section 409.7(a).

Los Angeles Free Press dealt with section 409.5(d), which provides that “a duly authorized representative of any news service, newspaper, or radio or television station” is permitted to go behind police and fire lines during a natural disaster. At issue was the practice of the Los Angeles police chief and sheriff to curtail the scope of the statute by issuing press credentials only to those reporters “who regularly covered police and fire news” and allowing only those credentialed reporters to cross police and fire lines. *Id.* at 458. The Court of Appeal held that the local law enforcement officials’ limitation of access to press credentials and natural disasters was not an abuse of discretion. *Id.* at 457.

But *Los Angeles Free Press* has zero application to section 409.7(a) because the 2021 statute provides an expanded journalist privilege to go behind police lines during any public “demonstration, march, protest, or rally where individuals are engaged in” First Amendment protected activity and “peace officers ... establish ... any ... rolling closure[s]” or declare an unlawful assembly and issue an order to disperse. This privilege is different from the privilege to go behind police lines at a natural disaster such as an earthquake or a flood.

The section 409.7(a) privilege is also more expansive than the section 409.5(d) privilege because it extends its protection to journalists with “online news services.”

Because the scope of section 409.7 is entirely different from the scope of section 409.5(d), *Los Angeles Free Press* does not permit law enforcement to restrict access to public demonstrations to only journalists who report about police and fires.

D. Can Foreign News Organizations Send Protected Journalists?

- Yes. The statute does not have any language excluding reporters who are representatives of non-U.S. news organizations. Some examples of foreign news organizations that could send “duly authorized representatives” who would be protected by the statute include British Broadcasting Corporation/BBC (United Kingdom); Canadian Broadcasting Corporation/CBC (Canada); and Agence France-Presse/AFP (France/Wire).

Note that Univision and Telemundo are U.S.-based Spanish language television stations whose “duly authorized representatives” are protected by the statute.

III. Who Is Not Protected by the Statute?

A California Court of Appeal has listed some individuals and organizations that would not qualify as a journalist under the state’s reporter’s shield law, which provides some guidance on the scope of section 409.7(a)(1)

- “[A] casual visitor to an open forum such as a newsgroup, chatroom, bulletin board system, or discussion group ... [who] deposit[s] ... information, opinion, or fabrication” on those online forums. *O’Grady*, 139 Cal. App. 4th at 1459.
- “A [p]ublisher of an ‘advertorial,’ i.e., a paid advertisement in the form of editorial content ... [can] not claim the newsgatherer’s shield where there was no evidence that the publisher had done anything more than *sell space* on its pages to the anonymous originators of an allegedly tortious publication.” *See O’Grady*, 139 Cal. App. 4th at 1458 (citation omitted) (emphasis in original).
- A person who lacks any experience working for a news organization or disseminating newsworthy information to the public on a periodic basis who films and publicly disseminates a cell phone video of a newsworthy event on a private social media account.¹ This individual still has the First Amendment right to peacefully film police in public, *see Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) and *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 826 (9th Cir. 2020), but this First Amendment protection for newsgathering does not translate into the statutory protection under Penal Code section 409.7(a)(1). *See generally O’Grady*, 139 Cal. App. 4th at 1466-67 (journalist’s shield law applies to “ongoing, recurring news publications” about “information about current events or interest and concern” to a “mass audience” and not to “non-recurring publications”).

IV. General Principles of Interpretation

- Section 409.7 is rooted in protecting the activity of newsgathering, which is unambiguously protected by the First Amendment. *See, e.g., Index Newspapers LLC*, 977

¹ We take no position in these guidelines as to whether such an individual should be shielded from a dispersal order or other interference on any legal basis other than PC 409.7(a)(1).

F.3d at 831 (citing cases). Courts have routinely recognized the “vital role” newsgathering plays in a functioning democracy. *See id.*

- The Ninth Circuit has recently ruled that for general dispersal orders to lawfully apply, they must be “essential to preserve higher values” and “*narrowly* tailored to serve that interest.” *Index Newspapers LLC*, 977 F.3d at 831 (emphasis added). Where applied to journalists not participating in the event or protest, general dispersal orders are not narrowly tailored. *See generally id.*
- Given this policy rationale and the Ninth Circuit’s recent rulings, “duly authorized” should be interpreted broadly, and any ambiguity as to who is protected should be resolved in favor of the journalist seeking access.

[EXHIBIT A: Los Angeles Police Department memo referenced on Page 2.]

10/30/2020

LAPD

DOC Communications Division

To All Department Personnel

Protests and demonstrations are occurring daily in Los Angeles as well as other cities across the Nation. Some of those public gatherings have involved instances of civil disobedience. Others have devolved into acts of violence against our personnel, vandalism, arson, and looting. Media representatives have a legitimate interest in providing the public with information on these events. Existing Department policy provides specific guidelines regarding media representative access to closed areas, as well as providing a safe designated area for media purposes.

The intent of this message is to remind supervisors and line personnel that the Department WILL recognize individuals who self-identify as media representatives and will NOT require specific media credentials. Public Communications Group and Media Relations Division have been in communication with the Radio Television News Association to discuss acceptable conduct during protests. While this organization does not represent every news entity, they do provide a communication conduit for many journalists in the area. There was shared agreement that media should seek to identify themselves to an officer or supervisor at an incident. While officers can ask individuals who identify themselves as a member of the media for identification from the organization they represent, which may consist of a business card or company ID, **the inability to produce identification does not preclude an individual from acting as a member of the media**

When an unlawful assembly has been declared and a dispersal order has been given, the Incident Commander (IC) and PIO representative will establish a safe working area for members of the media. Officers are reminded that media representatives may be allowed behind skirmish lines but may not move back and forth through police lines or otherwise interfere with police actions.

As always, the decision to assume any risk of danger involved in covering a public event remains with the individual news reporter making such decision; however, any such decision does not constitute a waiver by a reporter of any constitutional or other legal rights.

If there are any questions, please contact Media Relations Division at (213) 466-5910.

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