



## **NEW JERSEY LAW REVISION COMMISSION**

### **Final Report Relating to Uniform Electronic Legal Material Act**

**November 17, 2016**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.  
Please consult the New Jersey statutes in order to determine the law of the State.

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## Introduction

Electronic legal materials provide unprecedented accessibility but remain both fragile and potentially ephemeral. The Federal government has made significant efforts at providing accessible and authenticated electronic materials, but has at times struggled with the vulnerability of electronic publications.<sup>1</sup> States producing legal information in an electronic format must also consider the most secure and trustworthy method for producing these materials.

The Uniform Law Commission (ULC) recognized that “[p]roviding information online is integral to the conduct of state government in the 21<sup>st</sup> century” and in 2011 released the Uniform Electronic Legal Material Act (UELMA) to promote the authentication and preservation of these online materials.<sup>2</sup>

In its basic form, UELMA consists of the following components:

- State entities are not mandated to publish their statutes, regulations, cases, opinions, etc. (“Legal Material”) electronically.
- If a state entity publishes its Legal Materials **only** electronically, the Electronic Material **shall** be designated “official” and must be (a) authenticated, (b) preserved and (c) secured.
- If a state entity publishes its Legal Materials in other official mediums, the Electronic Legal Material **may** be designated “official” and would then be required to be (a) authenticated, (b) preserved and (c) secured.
- The Uniform Act applies only to Legal Materials published after the legislation’s stated effective date.

In its Prefatory Note, UELMA states that “[p]roviding information online is integral to the conduct of state government in the 21<sup>st</sup> century” and that “[t]he ease and speed with which information can be created, updated and distributed electronically, especially in contrast to the time required for the production of print materials, enables governments to meet their obligations to provide legal information to the public in a timely and cost-effective manner.”<sup>3</sup> Electronic information, the Prefatory Note cautions, is susceptible to being altered, accidentally or maliciously, at each point where it is stored, transferred or accessed and these alterations may be undetectable by the consumer. In addition, the ease with which electronic material may be altered raises the issue of how legal information with long-term historical value will be preserved

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<sup>1</sup> Recent upgrades to the Federal PACER system provide a cautionary tale. On August 10, 2014, decades of legal material from several U.S. Courts of Appeals were deleted from the federal PACER website as a result of a system incompatibility. Nadia Prupis, *Decade of Court Cases Quietly Wiped from Online Database* (August 28, 2014), available at <http://commondreams.org/news/2014/08/28/decade-court-cases-quietly-wiped-online-database> (last visited November 1, 2016).

After being confronted by the media about the deletions, the Administrative Office of the U.S. Courts developed a plan to restore the documents from existing print records. Andrew Peterson, *Online Court archive PACER says it will restore access to missing records*, THE WASH. POST (September 19, 2014), available at <http://www.washingtonpost.com/blogs/the-switch/wp/2014/09/19/online-court-archive-pacer-says-it-will-restore-access-to-missing-records/> (last visited November 1, 2016).

<sup>2</sup> Uniform Law Commission, *Uniform Electronic Legal Material Act*, Prefatory Note, July 2011.

<sup>3</sup> Uniform Law Commission, *Uniform Electronic Legal Material Act*, Prefatory Note, July 2011.

for future use. With regard to the issue of preservation, the benefits associated with electronic materials are described as “severely limited” if the information becomes unusable because of technological changes.

UELMA is designed to be an outcomes-based approach to the authentication and preservation of legal materials. The goals of the Uniform Act are to “enable end-users to verify the trustworthiness of the legal materials” and to “provide a framework for states to preserve legal material in perpetuity in a manner that allows for permanent access.”<sup>4</sup>

UELMA leaves the choice of technologies for authentication and preservation to the states, but seeks to harmonize standards for acceptance of electronic legal material across jurisdictional boundaries. The ULC intended for UELMA to complement the Uniform Commercial Code (covering sales and many commercial transactions), the Uniform Real Property Electronic Recording Act (providing for electronic recording of real property instruments), and the Uniform Electronic Transactions Act (providing guidelines for electronic commerce).

Twelve states have adopted UELMA and an additional seven jurisdictions have introduced it for consideration. The American Association of Law Libraries, the New Jersey Law Librarians Association, and the American Bar Association promote adoption of UELMA. Liaisons from the Seton Hall Law School library and the Rutgers School of Law library requested that the Commission review the UELMA for possible introduction in New Jersey and enactment by the Legislature.

The Commission considered UELMA in June 2012, June 2013, April 2015, June 2015, February 2016, and, most recently, March 2016. This Final Report recommends the adoption of the UELMA as modified to address the issues and concerns expressed by Commissioners and commenters regarding this project’s applicability in New Jersey.

## Analysis

The *State-by-State Report on Authentication of Online Legal Resources* referenced by drafters of UELMA describes an “official” version of legal materials as one that possesses the same status as a print “official” legal resource – one that is “governmentally mandated or approved.”<sup>5</sup> An “authentic” legal material is described as “one whose content has been verified by a government entity to be complete and unaltered when compared to the version approved or published by the content originator.”<sup>6</sup> The findings of an authentication survey set forth in the *State-by-State Report* include the following: (1) states have begun to discontinue print official legal resources and substitute online official legal resources; (2) states have not acknowledged the important needs of citizens and law researchers seeking trustworthy government information

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<sup>4</sup> *Id.*

<sup>5</sup> American Association of Law Libraries, *State-by-State Report on Authentication of Online Legal Resources* (March 2007), p. 7-8.

<sup>6</sup> *Id.* at 8.

– even with regard to “official” legal resources; and (3) only eight states have provided for permanent public access to one or more of their primary legal resources.<sup>7</sup>

### A. *Other States*

UELMA has been enacted in Arizona,<sup>8</sup> Colorado,<sup>9</sup> California,<sup>10</sup> Connecticut,<sup>11</sup> Hawaii,<sup>12</sup> Idaho,<sup>13</sup> Illinois,<sup>14</sup> Minnesota,<sup>15</sup> Nevada,<sup>16</sup> North Dakota,<sup>17</sup> Oregon,<sup>18</sup> and Pennsylvania.<sup>19</sup> In the current legislative session, it has been introduced in the District of Columbia, Massachusetts, Michigan, New York, Ohio, Washington, and West Virginia.<sup>20</sup> Costs of implementation among the enacting states have varied based upon the scope of legal material designated as official, as well as the technology utilized for the required authentication.<sup>21</sup>

### B. *New Jersey*

The State of New Jersey, via the websites of various State agencies, provides online access to an increasing amount of legal materials, as discussed below. The following information does not represent an exhaustive representation of every location at which one may find New Jersey legal material online, but only a collection of information based upon a preliminary examination of the website associated with the source or originator of the legal material discussed.

#### 1. *Executive Branch Materials:*

New Jersey’s Office of Administrative Law’s (“OAL”) website provides links to the New Jersey Administrative Code and the New Jersey Register maintained by the legal research provider LexisNexis.<sup>22</sup> While the LexisNexis banner proclaims to be the “Official Publisher of the New Jersey Administrative Code,” further terms of use stipulate that “this online version of the Code is not the official Code and may not include the most recent changes to a rule.”

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<sup>7</sup> *Id.* at 10-13.

<sup>8</sup> A.R.S. § 41-5501 *et. seq.* (effective August 6, 2016).

<sup>9</sup> C.R.S.A. § 24-71.5-101 *et. seq.* (effective March 31, 2014).

<sup>10</sup> WEST’S ANN. CAL. GOV. CODE § 10290 *et. seq.* (effective July 1, 2015).

<sup>11</sup> C.G.S.A. § 1-330 *et. seq.* (effective October 1, 2014).

<sup>12</sup> H.R.S. § 98-1 *et. seq.* (effective July 1, 2013).

<sup>13</sup> I.C. § 60-301 *et. seq.* (effective July 1, 2015).

<sup>14</sup> 5 ILCS 180/1 *et. seq.* (effective January 1, 2015).

<sup>15</sup> MINN. STAT. ANN. 3E.09 *et. seq.* (effective January 1, 2015).

<sup>16</sup> N.R.S. 721.160 *et. seq.* (effective January 1, 2014).

<sup>17</sup> NDCC, T. 46, Ch. 46-03.1 *et. seq.* (effective August 1, 2013).

<sup>18</sup> O.R.S. § 192.715 *et. seq.* (effective May 23, 2013).

<sup>19</sup> 44 PA. C.S.A. § 701 *et. seq.* (effective November 24, 2014).

<sup>20</sup> See generally, Uniform Law Commission, *Uniform Electronic Legal Material Act*, Enactment Status Map, available at <http://www.uniformlaws.org/Act.aspx?title=Electronic%20Legal%20Material%20Act> (last visited November 1, 2016).

<sup>21</sup> See generally, Michael Greenlee, *The Uniform Electronic Legal Material Act Comes to Idaho*, 58-JAN ADVOCATE (IDAHO) 48 (2015) (noting that, in many states, “none of the covered legal materials has been designated as *official* in an electronic format, so the provisions of UELMA do not yet apply.”)

<sup>22</sup> <http://www.lexisnexis.com/njoal/> (last visited November 1, 2016).

The OAL's website also provides a link to Rutgers Law School's research portal which purports to provide access to Administrative Law Decisions from 1982-1991<sup>23</sup> and 1997-present.<sup>24</sup> The website does not contain language regarding whether or not the decisions should be considered official.

The Office of Administrative Law's website additionally includes a link to "OAL Final Decisions and Orders (2014-Present)."<sup>25</sup> This link provides decisions relating to Special Education, the NJ Higher Education Student Assistance Authority, the NJ DEP Spill Compensation Fund Arbitration, and the Child and Adult Food Care Program. It is unclear whether this is a complete database or whether it should be considered official or reliable source.

The OAL is making efforts towards greater online accessibility. Pursuant to N.J.S. 52:14B-2 *et seq.*, effective July 1, 2014, all agencies must post on their websites notifications, proposed rule summaries, and summaries of written or oral submissions concerning a proposed rule, in addition to the traditional publication in the New Jersey Register. Agencies are also required to publish all final agency orders, decisions and opinions on their website. To effectuate the new law's requirements, the Office of Administrative Law has proposed new "Rules for Agency Rulemaking – Use of Electronic Technologies in Rulemaking."<sup>26</sup> The new rules would amend N.J.A.C. to require that each agency shall publish on its website "all final agency orders, decisions, and opinions, in accordance with N.J.S.A. 47:14A-1 *et seq.*"<sup>27</sup>

The statutory draft contained in this Final Report incorporates New Jersey's existing statutory mandates into the definition of legal materials. To the extent that the Legislature has required the electronic publication of various executive and legislative materials, it is imperative that the electronic materials are properly authenticated, secured and preserved.

## 2. *Legislative Materials:*

The New Jersey Legislature's website provides access to searchable, complete text of New Jersey's Constitution.<sup>28</sup> The website also provides an inoperable link to the New Jersey State Library for the New Jersey Constitutional Convention Proceedings of 1947.<sup>29</sup>

Pursuant to the requirements of N.J.S. 52:11-78, the Legislature's website also links to an electronic database of "the most current available compilation of the official text of the statutes

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<sup>23</sup> The Rutgers Law Library, available at <http://njlegallib.rutgers.edu/njar/njarhome.htm> (last visited November 1, 2016).

<sup>24</sup> The Rutgers Law Library, available at <http://njlaw.rutgers.edu/collections/oal/> (last visited November 1, 2016).

<sup>25</sup> New Jersey Office of Administrative Law, OAL Final Decisions, available at <http://www.nj.gov/oal/decisions/final/index.html> (last visited November 1, 2016).

<sup>26</sup> 46 N.J.R. 2221 (2014).

<sup>27</sup> *Id.* at 2225.

<sup>28</sup> New Jersey Legislature, New Jersey State Constitution, available at <http://www.njleg.state.nj.us/lawsconstitution/constitution.asp> (last visited November 1, 2016).

<sup>29</sup> New Jersey State Library, available at [http://www.njstatelib.org/NJ\\_Information/Digital\\_Collections/Digidox21.php](http://www.njstatelib.org/NJ_Information/Digital_Collections/Digidox21.php) (last visited November 1, 2016).

of New Jersey”<sup>30</sup> as well as “the text of all chapter laws beginning with laws passed by the Legislature after . . . January 9, 1996.”<sup>31</sup> The website provides no indication as to whether these databases should be considered official, and it has been suggested that since “the online statutory database leaves the user unsure whether it is official or not, it appears reasonable to conclude that the database, in fact, is not official.”<sup>32</sup> In addition to an “official” designation as contemplated by this Final Report, proper authentication by an official publisher will further add to the reliability and trustworthiness of these materials.

### 3. *Judicial Materials:*

The New Jersey judiciary makes decisions available on its website for a period of time ranging from 10 business days to six weeks, depending upon the judicial entity rendering the decision.<sup>33</sup> After this posting period, the judicial materials are archived and accessible through the Rutgers Law Library – Newark’s website,<sup>34</sup> as well as through commercial fee-based research engines.

The New Jersey Courts website does maintain a permanent, not all-inclusive database of certain case law relating to business practices, but clarifies that “[t]he availability of these opinions on this website does not constitute publication under New Jersey Rules of Court.”<sup>35</sup> The relevant *Rule of Court* stipulates that the only authoritative and official source for appellate decisions is the official print reporters.<sup>36</sup>

Previous Commission discussions about UELMA have noted that any requirements regarding judicial decisions may violate the precepts established in *Winberry v. Salisbury*<sup>37</sup> and potentially infringe upon the New Jersey Supreme Court’s exclusive authority over court administration. The New Jersey Courts and the Administrative Office of the Courts have historically established the rules regarding the publication of the court materials;<sup>38</sup> accordingly,

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<sup>30</sup> See New Jersey Legislature, New Jersey Permanent Statutes, available at [http://lis.njleg.state.nj.us/cgi-bin/om\\_isapi.dll?clientID=41956557&depth=2&expandheadings=off&headingswithhits=on&infobase=statutes.nfo&softpage=TOC\\_Frame\\_Pg42](http://lis.njleg.state.nj.us/cgi-bin/om_isapi.dll?clientID=41956557&depth=2&expandheadings=off&headingswithhits=on&infobase=statutes.nfo&softpage=TOC_Frame_Pg42) (last visited November 1, 2016).

<sup>31</sup> See New Jersey Legislature, New Jersey Chapter Laws, available at <http://www.njleg.state.nj.us/lawsconstitution/chapter.asp> (last visited November 1, 2016).

<sup>32</sup> American Association of Law Libraries, *State-by-State Report on Authentication of Online Legal Resources* (March 2007), p. 143.

<sup>33</sup> Opinions of the New Jersey Supreme Court, the Appellate Division (published and unpublished from 2005), the Tax Court, and the Disciplinary Review Board are posted on the New Jersey Courts website for 10 business days. Published Trial Court opinions are available for two weeks, while unpublished Trial Court opinions are available for six weeks. Ethics Committee opinions are not available on the New Jersey Courts website but are linked to the archive maintained by Rutgers Law Library – Newark.

<sup>34</sup> Rutgers School of Law – Newark, New Jersey Courts Search Page, available at <http://njlaw.rutgers.edu/collections/courts/search.php> (last visited November 1, 2016).

<sup>35</sup> New Jersey Courts, Business Related Opinions, available at <http://www.judiciary.state.nj.us/opinions/business/index.html> (last visited November 1, 2016).

<sup>36</sup> American Association of Law Libraries, *State-by-State Report on Authentication of Online Legal Resources* (March 2007), p. 142-3, citing N.J. CT. RULE 2:6-2(a)(5).

<sup>37</sup> 5 N.J. 240, cert. denied, 340 U.S. 877 (1950).

<sup>38</sup> See N.J. CT. RULE 1:36-2 (establishing publishing guidelines); see also New Jersey Courts, Supreme and Appellate Opinions, <http://www.judiciary.state.nj.us/opinions/index.htm> (last visited November 1, 2016) (noting that

the Commission recognizes the need to consider whether the “judiciary has fully exercised its power with respect to the matter at issue.”<sup>39</sup>

Jurisdictions adopting UELMA are split on whether judicial decisions are included within the definition of legal materials. Indeed, it appears that the four U.S. jurisdictions currently publishing authenticated judicial legal material have done so either through court initiative or court rule.<sup>40</sup> The statutory draft contained in this Final Report does not include judicial materials in the definition of legal materials, but instead recommends that the New Jersey Supreme Court adopt rules to effectuate the purposes of this act as it relates to judicial legal material.

### **C. Enforcement mechanism:**

UELMA does not contain any provisions imposing consequences upon an official publisher who fails to comply with its requirements. In previous discussions, the Commission has considered whether a penalty or enforcement mechanism might be appropriate to ensure that UELMA’s goals of accessibility and security are realized. Staff has evaluated several existing statutory enforcement schemes for guidance.

#### *1. Escalating fines – N.J. Open Public Records Act*

New Jersey’s Open Public Records Act (“OPRA”) provides for civil and disciplinary proceedings against “a public official, officer, employee or custodian who knowingly and willfully violates” its requirements.<sup>41</sup> The penalties specified for violations include \$1,000 for the first violation, \$2,500 for a subsequent violation occurring within 10 years of the first, and \$5,000 for a third violation occurring within 10 years of the first violation.<sup>42</sup>

Procedurally, OPRA requires an identified record request, a response within a statutory timeframe, and imposes penalties when a requested record is inappropriately withheld. N.J.S. 47:1A-5. Staff is unclear whether OPRA’s individual demand/response mechanism can be adapted to the authentication, security and preservation requirements contemplated by UELMA. It may be more difficult for a records custodian to comply with the technical provisions of this act than it is to produce records in accordance with OPRA. In theory, any member of the public would be entitled to petition for enforcement of these provisions. Also, Staff has noted that the concept of a violation as used in OPRA is more complicated when applied to electronic materials.

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opinions will be available on NJ Court website for 10 days and thereafter accessed through Rutgers Newark Law School).

<sup>39</sup> *Ferreira v. Rancocas Orthopedic Associates*, 178 N.J. 144, 163 (2003) (Zazzali, concurring) (elaborating upon the two-prong analysis guiding judicial tolerance of legislative intrusion).

<sup>40</sup> Arkansas, New Mexico, Ohio and Utah publish electronic, authenticated judicial decisions; none of these jurisdictions have adopted UELMA. Catherine M. Dunn & Jane Larrington, *Best Practices for the Authentication of Official Electronic Legal Material* (November 26, 2014), Appendix A, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2547179](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2547179) (last visited November 1, 2016).

<sup>41</sup> N.J.S.A. § 47:1A-11 (West).

<sup>42</sup> *Id.*

## 2. *Invalidation of actions – N.J. Open Public Meetings Act and U.S. Administrative Procedures Act*

New Jersey’s Open Public Meeting Act (“OPMA”) also penalizes those violating its provisions. Individuals may apply to the Superior Court to void actions taken by public bodies at meetings not in conformance with OPMA’s requirements.<sup>43</sup> The OPMA also permits the Attorney General or county prosecutor to enforce financial penalties of \$100 for the first offense, and between \$100 and \$500 for subsequent offenses, against any person who knowingly violates the act.<sup>44</sup>

The federal government has developed its own enforcement mechanism under the Administrative Procedure Act (“APA”). The APA requires that agencies provide certain information in the Federal Register for the guidance of the public.<sup>45</sup> Consequently, “a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.”<sup>46</sup> The U.S. Supreme Court has interpreted this provision to invalidate administrative decisions based upon an interpretive rule that the agency has failed to publish.<sup>47</sup>

The New Jersey Administrative Procedures Act requires a state agency to “make available for public inspection all final orders, decisions, and opinions, in accordance with the provisions of 47:1A-1 et seq.”<sup>48</sup> Agencies are also required to publish a quarterly calendar of anticipated rule-making activities in the New Jersey Register.<sup>49</sup> It is unclear whether administrative invalidation would be an appropriate penalty in instances in which an agency failed to publish its legal materials electronically but maintained print publishing required by the New Jersey Administrative Procedures Act. Also, while perhaps feasible prospectively, the present statutory draft includes existing electronic legal material; invalidating large swaths of the regulatory scheme for failure to comply with this act could be troublesome.

## 3. *Compelled performance – Action in lieu of prerogative writs*

New Jersey’s 1947 Constitution aggregated the common law prerogative writs of certiorari, quo warranto, prohibition and mandamus, and “in lieu thereof” provided for “review, hearing and relief . . . in the Superior Court, on terms and in the manner provided by the rules of the Supreme Court, as of right.”<sup>50</sup> Actions in lieu of prerogative writs filed against municipal agencies are governed by N.J. Ct. R. 4:69 and heard by the Law Division of the New Jersey Superior Court; actions brought against state agencies are within the Appellate Division’s jurisdiction pursuant to N.J. Ct. R. 2:2-3(a)(2).<sup>51</sup>

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<sup>43</sup> N.J.S.A. § 10:4-15 (West).

<sup>44</sup> N.J.S.A. § 10:4-17 (West).

<sup>45</sup> 5 U.S.C.A. § 552 (West).

<sup>46</sup> *Id.*

<sup>47</sup> *Morton v. Ruiz*, 415 U.S. 199, 230-6 (1974).

<sup>48</sup> N.J.S.A. 52:14B-3(3) (West).

<sup>49</sup> N.J.S.A. 52:14B-3(4) (West).

<sup>50</sup> N.J. CONST. art. VI, § 5, ¶ 4; *see also Vas v. Roberts*, 418 N.J. Super. 509, 521, 515 (App. Div. 2011).

<sup>51</sup> N.J. Ct. R. 2:2-3, cmt. 3.1.

An action in lieu of prerogative writs allows citizens “to correct public misdoing and compel performance of public duty.”<sup>52</sup> With regard to state agencies, the Appellate Division’s jurisdiction applies to both state action and inaction.<sup>53</sup> This judicial enforcement of legislative mandate is an attractive enforcement mechanism, but in some instances N.J courts have been reluctant to compel state agencies to produce information required by statute in the required timeframe.<sup>54</sup> Yet, this may represent an enforcement mechanism that allows for an appropriate balancing of government resources.

In light of the difficulties presented by the OPRA approach to enforcement as applied to electronic materials, this Final Report proposes a section similar to that of OPMA, notifying the public that they may compel compliance with this act by an action in lieu of prerogative writs in the nature of mandamus.

### **Conclusion**

The Commission believes that UELMA is a useful framework to ensure the accessibility, reliability, and security of New Jersey’s varied legal material. This Final Report recommends language that largely reflects UELMA, but also incorporates modifications addressing the Commission and commenters’ concerns. Language proposed by the New Jersey Law Revision Commission is underlined. Language marked with ~~strike through~~ indicates a deletion from the UELMA.

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<sup>52</sup> *Garrou v. Teaneck Tryon Co.*, 11 N.J. 294, 302 (1953).

<sup>53</sup> *Id.*

<sup>54</sup> See *In re Failure by the Department of Banking and Ins. to Transmit a Proposed Dental Fee Schedule to the OAL*, 336 N.J. Super 253 (App. Div. 2001) (declining to compel the Department to complete a statutorily mandated dental fee schedule “forthwith” but noting “that we are distressed by the Department’s apparent lack of progress in revising the dental fee schedule”); *In re Commissioner’s Failure to Adopt 861 CPT Codes*, 358 N.J. Super. 135 (App. Div. 2003) (declining to compel the Department to produce the fee schedule required by statute partly because “an agency has broad discretion in deciding how to accomplish tasks assigned by the legislature” (citations omitted)).

## UNIFORM ELECTRONIC LEGAL MATERIAL ACT

**SECTION 1. SHORT TITLE.** This {act} may be cited as the Uniform Electronic Legal Material Act.

Source: New.

### COMMENT

This Final Report retains the title “Uniform Electronic Legal Material Act.” The Commission had a preliminary discussion regarding whether the original text of UELMA is so substantially altered that it can no longer be designated as uniform. In past instances, the Commission has recommended acts that largely reflect the intent and purposes of a Uniform Act, but have been modified to address New Jersey-specific issues or comport with New Jersey laws or practices. In light of the state specific modifications, on some occasions these recommended have been titled as the New Jersey version of the Uniform Law Commission’s Act (e.g., New Jersey Emergency Volunteer Health Practitioners Act, New Jersey Family Collaborative Law Act). For the Legislature’s further consideration as to how this act should best be titled, below is a summary of some areas in which the statutory text proposed in this DFR modifies UELMA.

- The DFR incorporates references to New Jersey’s existing publication mandates.
- The DFR applies to existing electronic legal material, while UELMA only applies to materials published on or after the effective date.
- The DFR dispenses with UELMA’s mechanism for optionally designating material as official. Instead, the DFR deems the published legal material to be official and subject to the authentication, preservation and security mandates.
- The DFR permits an official publisher to delegate its duties; UELMA does not contain a similar provision.
- The DFR provides greater specificity than UELMA regarding the type of electronic information that must be preserved.
- The DFR grants the Division of Revenue and Enterprise Services regulatory authority to effectuate the act’s purposes.
- The DFR states an enforcement mechanism while UELMA does not.
- The DFR encourages the New Jersey Supreme Court to adopt court rules to effectuate the purposes of the act in recognition of *Winberry* concerns.

**SECTION 2. DEFINITIONS.** In this {act}:

~~(1)~~a. “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

b. “Governmental agency” means an executive or legislative, department, board, commission, authority, institution or instrumentality of a state or other political subdivision of a state.

~~(2)~~c. “Legal material” means, whether or not in effect, and as amended, revised or

superseded:

- (1) the New Jersey Constitution of 1947;
- (2) the New Jersey Chapter Laws, including both Advance Laws and Pamphlets;
- (3) the New Jersey Permanent Statutes;
- (4) any joint resolutions;
- (5) any proclamations of the Governor;
- (6) any annual or special reports issued electronically pursuant to N.J.S. 52:14-

20.1;

- (7) the following state agency materials:
  - (A) administrative rules as defined in N.J.S. 52:14B-2;
  - (B) regulatory guidance documents as defined in N.J.S. 52:14B-3a;
  - (C) reports and decisions issued in connection with administrative adjudications, as defined in N.J.S. 52:14B-2;
  - (D) all final agency orders, decisions, and opinions issued in accordance with subsection (3) of N.J.S. 52:14B-3; and
  - (E) information posted pursuant to 52:14B-31;
- (8) formal opinions of the Attorney General of New Jersey; and
- (9) such other legal material as may be identified by a governmental agency that is the source of the material.

~~(3)~~d. “Official publisher” means:

- (1) for the New Jersey State Constitution of 1947, the Office of Legislative Services;
- (2) for the New Jersey Chapter Laws, including both Advance Laws and

Pamphlets, the Office of Legislative Services;

(3) for the New Jersey Permanent Statutes, the Office of Legislative Services; ~~for~~

(4) for joint resolutions, the Office of Legislative Services;

(5) for proclamations of the Governor, the Office of the Governor;

(6) for annual or special reports issued pursuant to N.J.S. 52:14-20.1, the governmental agency issuing the report;

(7) for an administrative rule or regulatory guidance document:

(A) published in the New Jersey Administrative Code, the Office of Administrative Law; or

(B) not published in the New Jersey Administrative Code, the state agency adopting the administrative rule or regulatory guidance document;

(8) for a state agency materials:

(A) included under subsection c.(6)(C), the Office of Administrative Law;

(B) included under subsection c.(6)(D), the state agency issuing the decision; or

(C) included under subsection c.(6)(E), the state agency posting the information;

(9) for the formal opinions of the Attorney General, the Office of the Attorney General; and

(10) for such other material identified by a governmental agency, the government agency that is the source of the material.

~~[(G) for a state court decision included under paragraph (2)(F), the ~~insert appropriate agency or official~~];] ~~or~~~~

~~[(H) for state court rules, the [insert appropriate agency or official]][:]; [or]~~

e. “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity

~~(4)f.~~ “Publish” means to display, present, or release to the public, or cause to be displayed, presented, or released to the public, by the official publisher.

~~(5)g.~~ “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

~~(6)~~ “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States

h. “State agency” or “agency” shall have the meaning set forth in N.J.S 52:14B-2.

Source: New.

#### COMMENT

As the ULC Report explains, in the Comment to Section 2, “[t]he definition of ‘legal material’ is intentionally narrow. As drafted, it includes only the most basic state-level legal documents: the state constitution, session laws, codified laws, and administrative rules with the effect of law. The act suggests as alternatives a range of additional legal material.” Each enacting state is given discretion in identifying what types of legal documents may also be covered by the act.

The New Jersey Legislature and Administrative Agencies are statutorily mandated to publish various materials on their respective websites; the language of this Section was drafted to incorporate existing publication mandates and subject them to the provisions of Sections 4, 5, and 7 of this act.

N.J.S.52:11-78 requires the Office of Legislative Services (“OLS”) to publish and maintain in electronic form “(1) the most current available compilation of the official text of the statutes of New Jersey [and] . . . (7) the text of all chapter laws beginning with laws passed by the Legislature after 12:00 noon, January 9, 1996.” Additionally, substantial revisions to the Administrative Procedure Act operative as of July 1, 2014 require the publication of agency materials on each agency’s respective website. *See* P.L.2013, c. 259. Accordingly, this draft looks to these statutory provisions for guidance in defining legal materials.

While OLS is also required to publish joint proclamations and Executive Orders pursuant to N.J.S. 1-3.1, the statute has not been amended to mandate electronic publication. However, these publications are currently available electronically at website of the New Jersey Legislature and the official website of the State of New Jersey, respectively.

Publication of the formal opinions of the Attorney General is not required by statute, but the practice was instituted in 1949 pursuant to Attorney General Parsons’ Preface to the 1949-1950 volume of Formal Opinions and

continues to the present day. The formal opinions are currently available electronically on the Office of the Attorney General's website.

For purposes of the state agency materials contained in subsection (7) of Section 2c.:

"Administrative adjudication" includes "any and every final determination, decision, or order made or rendered in any contested case." N.J.S. 52:14B-2. Pursuant to regulation, the "publication function of the OAL is multifaceted" and the "availability of decisions in contested cases provides the public with access to administrative adjudications." N.J.A.C. 1:31-1.1.

"Administrative rule" means "each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of any agency; (2) intra-agency and inter-agency statements; and (3) agency decisions and firings in contested cases." N.J.S. 52:14B-2.

"Regulatory guidance document" means "any policy memorandum or other similar document used by a state agency to provide technical or regulatory assistance or direction to the regulated community to facilitate compliance with a State or federal law or a rule adopted pursuant to P.L. 1968, c.410, but shall not include technical manuals adopted by the Department of Environmental Protection pursuant to P.L. 1991, c. 422 (C.13:1D-111)." N.J.S. 52:14B-3a.

"State agency" or "agency" means "each of the principal departments in the executive branch of the State Government, and all boards, divisions, commissions, agencies, departments, councils, authorities, offices or officers within any such departments now existing or hereafter established and authorized by statute to make, adopt or promulgate rules or adjudicate contested cases, except the office of the Governor." N.J.S. 52:14B-2.

The definition of governmental agency was incorporated from New Jersey's Uniform Electronic Transactions Act, codified at N.J.S. 12A:12-2, to include both the executive and legislative branches of government.

Subsection c.(7)(E) captures the mandate of N.J.S. 52:14B-31 which requires the posting of "the complete and current text of each State law under which the agency is granted its authority, and the complete and current text of each rule or regulation that has been adopted by the agency or that is proposed for, or is pending, agency adoption" or a URL address providing a direct link to the complete and current text of these documents.

The subsection e. definition of "person" has been added to permit an official publisher to contract with another person pursuant to Section 4c. to satisfy the provisions of this act and is derived from New Jersey's Uniform Electronic Transactions Act, N.J.S. 12A:12-2.

The Report notes that in "some states, the publication of judicial decisions and court rules is handled by the judicial branch, over which the state legislature may have no authority to mandate specific procedures such as those created by this act. Because of this potential separation of powers issue, judicial decisions and court rules are included in this act as an alternative in the definition of legal material." As discussed in this Final Report, the Commission remains aware that including judicial materials within the scope of this act could potentially run afoul of the separation of powers established by *Winberry v. Salisbury*, 5 N.J. 240, cert. denied., 340 U.S. 877 (1950). Accordingly, this Final Report references judicial legal materials in Section 10 and authorizes the New Jersey Supreme Court to adopt court rules to effectuate the purposes of this act. Staff will seek input from interested individuals as to whether this is the most appropriate course.

**SECTION 3. APPLICABILITY.** This {act} applies to all legal material in an electronic record ~~that is designated as official under Section 4 and first existing electronically on~~ or published electronically on or after [the effective date of this {act}].

Source: New.

COMMENT

UELMA's language has been revised to capture materials existing on New Jersey government websites on the effective date as well as prospective publications.

#### **SECTION 4. LEGAL MATERIAL IN OFFICIAL ELECTRONIC RECORD.**

a. The legal material published by an official publisher in an electronic record is presumed to be is deemed to be an official copy of the legal material.

~~ba. If a~~ An official publisher publishes of legal material ~~only~~ in an electronic record, ~~the publisher shall:~~

(1) ~~designate~~ identify the electronic record as official; ~~and~~

(2) comply with Sections 5; ~~and~~ 7; and ~~8; and~~

(3) ensure that the material is reasonably available for use by the public on a permanent basis.

~~(b) An official publisher that publishes legal material in an electronic record and also publishes the material in a record other than an electronic record may designate the electronic record as official if the publisher complies with Sections 5, 7, and 8.~~

c. An official publisher may satisfy subsection b. of this section by delegating the enumerated duties to another person, provided that the person agrees to meet or exceed the requirements of that subsection and does not charge the end-user a fee to access the legal material.

Source: New

#### COMMENT

The prior version of this Report declined to incorporate UELMA's requirement that legal material be designated "official" to trigger the requirements of Sections 4, 5 and 7. The Commission remains committed to the availability and accessibility of New Jersey's legal materials. The Commission had concerns that, as envisioned by UELMA, the concept of optionally designating electronic legal materials as "official" may create an additional procedural hurdle to ensuring electronic accessibility and providing appropriate safeguards of electronic legal material.

For example, N.J.S. 52:14-20.1 and N.J.S. 52:14-25.1 provide that reports or publications submitted to the Governor or Legislature or made available to the public should be posted to the Internet in lieu of printing while one to six print copies should be provided to the State Library "for preservation and permanent reference use." As contemplated by UELMA, this singular print copy could be considered New Jersey's "official" legal material unless

the governmental agency chose to designate the electronic version as official and comply with the provisions of this act. This result neither encourages accessibility nor promotes the authentication and preservation of New Jersey's electronic legal materials.

Certainly, the determination of whether or not a legal material should be considered "official" by the end-user could be satisfied by having the official publisher comply with the authentication provisions of Section 5. For example, U.S. Government Publishing Office identifies itself as "the official disseminator of Government documents and has assured users of their authenticity." This statement demonstrates that an official publisher utilizing appropriate authentication procedures produces an accessible and trustworthy document.

The Uniform Law Commission similarly emphasized the issue of authentication, stating in UELMA's prefatory note:

"An *authentic* text is one whose content has been verified by a government entity to be complete and unaltered when compared to the version approved or published by the content originator." (American Association of Law Libraries, STATE-BY-STATE REPORT ON AUTHENTICATION OF ONLINE LEGAL RESOURCES 8 (2007)). In the context of this act, the content originator is the official publisher. When a document is authentic, it means that the version of the legal resource presented to the user is the same as that published by the official publisher. Authentication provides an electronic method to establish the integrity of the document, demonstrating that the information has not been tampered with or altered during the transfer between the official publisher and the end-user. Few state governments have taken the actions necessary to ensure that the electronic legal information they create and distribute remains unaltered and is, therefore, trustworthy or authentic.

As noted in the *State-by-State Report on Authentication of Online Legal Resources*:

The working definition of official legal resource, drawn from the latest editions of Black's Law Dictionary and Fundamentals of Legal Research and adopted as a guide to survey participants, reads:

An official version of regulatory materials, statutes, session laws, or court opinions is one that has been **governmentally mandated or approved by statute or rule** (emphasis added). This definition is firmly rooted in the print world. Now, however, the survey results make it evident that the very concept of an official legal resource fits print much more easily than online sources of law.

The Bluebook Uniform System of Citation has also recognized the increasing prevalence of electronic legal publications. The Bluebook requires citation of "traditional printed sources. . . unless there is a digital copy of the source available that is authenticated, official or an exact copy of the printed source." Rule 18.2. The Bluebook encourages citation to an authenticated document to ensure the accuracy of the material and "generally prefers citation to an authenticated source, or if none is available, to the 'official' source." Rule 18.2.2.

In a previous Tentative Report, the Commission considered dispensing with UELMA's concept of designating documents as "official," instead focusing on proper authentication of legal material published pursuant to statutory mandate. It has been noted that "[w]hen a court publishes a decision on the web, it can scarcely deny that it is an official publication, absent elaborate qualifications." Richard J. Matthews, *Why Authentication Procedures Matter for US and UK Public Legal Resources on the Web*, LEGAL INFORMATION MANAGEMENT, 8 (2008) (citations omitted). Eliminating the requirement of an "official" designation could efficiently further the Commission's goal of public accessibility, and provide a framework for the authentication, security and preservation of legal materials on New Jersey government websites.

However, commenters to the previous Commission Tentative Report expressed reservations about discarding the concept of an "official" designation. In particular, it was noted that "the UELMA drafting committee heard testimony that, in addition to having assurance that the legal material on a website is trustworthy, the public wants to know if the electronic version they accessed is the official government version." One commenter further noted that it could prove difficult or burdensome for the public to determine whether presented legal material is the official government version in light of the many republishers of legal material. To address these concerns, this

Section deems the legal material published by an official publisher official and requires the official publisher to identify it as such.

Subsection c. has been added to permit an official publisher to contract with another person to satisfy the provisions of this act. The language of this subsection mirrors similar language contained in New Jersey's Uniform Electronic Transactions Act, N.J.S. 12A:12-12, regarding electronic record retention. The Commission is mindful that delegation to, and subsequent public reliance upon, fee-based research portals would frustrate the concept of public accessibility contemplated by this act. As a result, this subsection clarifies that a person accepting the delegation of duties contained in this act may not charge the public a fee to access the legal materials.

## **SECTION 5. AUTHENTICATION OF OFFICIAL ELECTRONIC RECORD.**

a. An official publisher of legal material in an electronic record that is ~~designated as~~ deemed official under pursuant to Section 4 shall authenticate the record.

b. To authenticate an electronic record, the official publisher shall provide a method for a user to determine that the record received by the user from the official publisher is unaltered from the ~~official~~ record published by the official publisher.

Source: New.

### COMMENT

This section has been revised to emphasize the importance of the official publisher as the source of reliable legal material that should be properly authenticated.

## **SECTION 6. EFFECT OF AUTHENTICATION.**

~~(a.)~~ Legal material in an electronic record that is authenticated ~~under~~ pursuant to Section 5 is presumed to be an accurate copy of the legal material.

~~(b.)~~ If another state has adopted a law substantially similar to this ~~act~~, legal material in an electronic record that is designated as official and authenticated by the official publisher in that state is presumed to be an accurate copy of the legal material.

~~(c.)~~ A party contesting the authentication of legal material in an electronic record authenticated ~~under~~ pursuant to Section 5 has the burden of proving by a preponderance of the evidence that the record is not authentic.

Source: New.

## COMMENT

This language reflects the ULC source language.

The Commission has considered the possibility of discrepancies between online legal material and its print counterpart. In New Jersey, an enrolled bill deposited with the Secretary of State is conclusive proof of the law's enactment and contents. *State v. Cranbury Tp.*, 68 N.J.L. 149, 160 (1902). In the event of conflict between an enrolled bill and New Jersey's codification in the Revised Statutes, the enrolled bill prevails. *Id.* This approach is consistent with the treatment of federal legislation; in the event of inconsistency between sources, the Statutes at Large will prevail over the United States Code. *U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 448 (1993) (noting that "[t]hrough the appearance of a provision in the current edition of the United States Code is 'prima facie' evidence that the provision has the force of law . . . it is the Statutes at Large that provides the 'legal evidence of laws'"); *Stephan v. United States*, 319 U.S. 423, 426 (1943) (interpreting 1 U.S.C. § 204(a)). Research has not uncovered any guidance regarding discrepancies between print and online "official" versions of federal or state law, but it is reasonable to think that the conflict would be resolved by referencing the Statutes at Large or the bill enrolled with New Jersey's Secretary of State, as the case may be.

### **SECTION 7. PRESERVATION AND SECURITY OF LEGAL MATERIAL IN ~~OFFICIAL~~ ELECTRONIC RECORD.**

(a.) An official publisher of legal material in an electronic record ~~that is or was~~  
~~designated as official under Section 4~~ shall provide for the preservation and security of the  
record in an electronic form or a form that is not electronic.

(b.) If legal material is preserved under subsection (a) in an electronic record, the official  
publisher shall:

- (1) ensure the integrity of the record;
- (2) provide for backup and disaster recovery of the record; and
- (3) ensure the continuing usability of the material.

c. The official publisher shall preserve and secure both current and historical legal  
material, including legal material that has been amended, overruled, repealed, reversed, revised  
or superseded.

d. A backup of a record of legal material must include the original record and all  
subsequent changes, and identify when each change to the record was made.

e. Legally significant formatting of legal material must be preserved.

Source: New.

#### COMMENT

The official publisher is required to provide for the preservation and security of the record in an electronic form, including insuring the legal material's integrity, providing for backup and disaster recovery and ensuring the continuing usability of the record.

As the ULC further explains, “[l]egal material retains its value regardless of whether it is currently in effect. This includes legal material that is subsequently amended or repealed, as happens with statutes, as well as legal material such as cases that may be reversed or overruled. Legal material does not cease to be legal material with the passage of time. For example, the outcome of today’s lawsuit may depend on rights or obligations created by yesterday’s statutes or regulations. Researchers need historical as well as current legal material to understand the development of legal doctrine and predict its future course. Legal material must be saved and protected—preserved—to allow for future use.”

Recognizing the significance of preserving both current and historical legal material, subsection c. was added for clarification on this issue and subsections d. and e. were included to incorporate minimum standards. Staff will seek comment on these subsections.

~~**SECTION 8. PUBLIC ACCESS TO LEGAL MATERIAL IN OFFICIAL ELECTRONIC RECORD.** An official publisher of legal material in an electronic record that is required to be preserved under Section 7 shall ensure that the material is reasonably available for use by the public on a permanent basis.~~

#### COMMENT

This provision requiring public access to electronic legal materials is now contained within subsection (3) of section 4b. of this act.

#### **SECTION 98. STANDARDS.**

a. The Division of Revenue and Enterprise Services in the Department of the Treasury shall adopt regulations to establish format and technical requirements for the authentication, preservation and security of legal materials in an electronic record to effectuate the provisions of this act.

b. In implementing this {act}, an official publisher of legal material in an electronic record and the Division of Revenue and Enterprise Services shall consider:

(1) standards and practices of other jurisdictions;

(2) the most recent standards regarding authentication of, preservation and security of, and public access to, legal material in an electronic record and other electronic records, as promulgated by national standard-setting bodies;

(3) the needs of users of legal material in an electronic record;

(4) the views of governmental officials and entities and other interested persons; and

(5) to the extent practicable, methods and technologies for the authentication of, preservation and security of, and public access to, legal material which are compatible with the methods and technologies used by other official publishers in this state and in other states that have adopted a law substantially similar to this {act}.

Source: New.

#### COMMENT

An official publisher of legal materials is required to consider standards and practices in use both inside and outside of his or her jurisdiction.

The ULC Report states, in the Comment to Section 9, that as “private sector organizations, government agencies, and international organizations tackle these issues, their work may offer guidance to states as this act is implemented on an on-going basis. Like many other technology-related procedures, standards and best practices for management of electronic records are in a state of development and refinement. For example, appropriate information security is a key element of the authentication process, and security standards are currently being developed.” The Report encourages each enacting state “to consider a single system for authentication of, preservation and security of, and public access to its legal material. A single system will lead to financial and personnel efficiencies in implementation and maintenance, and avoid confusion on the part of the users. While each enacting state will determine its own practices, states are encouraged to communicate, coordinate, and collaborate in the development of authentication, preservation, and permanent access standards.”

Presently, it does not appear that there are standards specifically directed toward the preservation of electronic material with the exception of e-mail messages that meet the criteria for public records as mentioned in a Circulating letter from DARM to all state and local government agencies. The Letter states that “retention or disposition of e-mail messages must be related to the information they contain or the purpose they serve. The content, transactional information, and any attachments associated with the message are considered records (if they meet the criteria of a public record in N.J.S. 47:3-16). The content of e-mail messages may vary considerably, and therefore, this content must be evaluated to determine the length of time the message must be retained.”

The language of subsection a. was based on language found in N.J.S. 46:26C-1 and was designed to clearly authorize participation by DRES (formerly DARM) to the extent it deems regulation in this area necessary. In the absence of regulations adopted by DRES, the onus is on the official publisher to take steps to address authentication, preservation and security concerns.

## **SECTION 9. PROCEEDING IN LIEU OF PREROGATIVE WRIT TO COMPEL ENFORCEMENT.**

Any party, including a member of the public, may institute a proceeding in lieu of prerogative writ in the Superior Court to enforce the provisions of this act.

Source: New.

COMMENT

The Commission recognizes the importance of publically accessible, trustworthy and secure electronic legal material. This section informs the public of the method in which one may compel performance of these requirements. The drafted language is partially based upon the provision of N.J.S 10:4-15 (titled “Proceeding in lieu of prerogative writ to void action at nonconforming meeting”), which describes the manner in which a party may challenge and invalidate government actions that may have occurred in violation of the Open Public Meetings Act.

**SECTION 10. COURT RULES.**

The New Jersey Supreme Court may adopt such court rules as it deems necessary to effectuate the purposes of this act.

Source: New.

COMMENT

As discussed in the Comment to Section 2, judicial publications have not been included in the definition of legal materials in this Final Report. This Section enables the Supreme Court to adopt rules consistent with the purposes of this act; this approach has been modeled off of N.J.S. 47:1A-12, which similarly authorizes the Court to adopt rules regarding the production of court and administrative records consistent with the intent of the Open Public Records Act.

**SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION.**

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Source: New.

COMMENT

This language is identical to the ULC source language.

**SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.** This {act} modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not

modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.

Section 7003(b).

Source: New.

COMMENT

This language is identical to the ULC source language.

**SECTION 13. EFFECTIVE DATE.** This {act} takes effect [\_\_\_\_\_].

Source: New.

COMMENT

This language is identical to the ULC source language. The Legislature may consider whether different timing requirements should apply to legal materials existing on the Effective Date and those initially published after the Effective Date. *See, e.g.* N.J. A.B. 456 (2016) (requiring a government record created after the bill's effective date to be published online within 60 days of its creation and a government record created before the bill's effective date to be published online within six months of the bill's effective date).