Legislative Analysis

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ACCESSING ELECTRONIC DATA OR COMMUNICATIONS: REQUIRE SEARCH WARRANT

House Joint Resolution "C" (reported from committee without amendment)
Sponsor: Rep. Jim Runestad
Committee: Judiciary
Complete to 5-3-17

BRIEF SUMMARY: House Joint Resolution C would amend Section 11 of Article I of the state constitution to require the government to obtain a search warrant in order to access a person's electronic data or electronic communications.

FISCAL IMPACT: This amendment would have no fiscal impact on the Department of State Police, local law enforcement agencies, or the judiciary.

THE APPARENT PROBLEM:

The Fourth Amendment to the U.S. Constitution, echoed in Section 11 of the Michigan constitution, protects citizens from unreasonable search and seizure of property. Generally speaking, a warrant is required before law enforcement can search a person's home, car, person, or look in a briefcase, among other things. More recently, the U.S. Supreme Court ruled in *Riley* v *California* (2014) that a search of a cell phone incident to an arrest requires a warrant. However, this ruling only addressed accessing data information on a cell phone; to expand this scope to other electronics, another case would have to be litigated, or a federal amendment would have to be enacted. Yet, these processes can be lengthy. In the meantime, law enforcement must obtain a warrant to search a person's postal mail, but a warrant is not required to read a person's electronic mail.

Because the laws have not caught up with technology, this resolution seeks to modernize Michigan's protections against unreasonable searches and seizures.

THE CONTENT OF THE BILL:

House Joint Resolution C would amend Section 11 of Article I of the State Constitution to require the government to obtain a search warrant in order to access a person's electronic data or electronic communications.

Currently, Section 11 protects against unreasonable searches and seizures by the government. A warrant cannot be issued to search a place or seize a person or things without describing them and must show probable cause, supported by oath or affirmation.

The resolution would apply the protection described above to electronic data and electronic communications and would require a search warrant to access electronic data or electronic communications.

To become part of the constitution, the resolution requires a two-thirds vote in each house of the Legislature and approval by the voters at the next general election. A general election is an election held in November of an even-numbered year.

ARGUMENTS:

For:

Adoption of the resolution would mean voters would have the opportunity to decide if the state constitution should require law enforcement to obtain a warrant before searching a person's electronic devices. Proponents say the amendment is needed because the law has not kept up with advances in technology. Amending the State Constitution would mean that Michiganders would not have to wait for the US Supreme Court to apply the Fourth Amendment to searches of electronic data, wherever the data is stored and from whatever type of device it was generated; for example, cell phone, computer, tablet, or iPod. Americans increasingly use the Internet to conduct both personal and business affairs, and data is stored almost indefinitely by service providers, external devices, or in Cloud storage. Simply put, the amendment would protect access to electronic data in the same way as access to hard data (for example, a diary, letters, photographs), regardless of where it is stored. A handful of states have recently enacted or introduced similar amendments to their state constitutions.

Against:

Critics of efforts to amend state constitutions regarding search and seizure protections say such efforts are likely to have unintended consequences. In particular, such state constitutional amendments could make it more difficult for Michigan law enforcement officials and agencies to investigate cybercrimes and enforce cybercrime laws; for example, Internet child pornography rings. Federal law enforcement agencies would not be impacted by adoption of the resolution.

POSITIONS:

A representative from the Michigan Bankers Association indicated support for the resolution. (4-25-17)

A representative from the American Civil Liberties Union of Michigan indicated support for the resolution. (3-28-17)

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