# Legislative Analysis



## ACCESSING ELECTRONIC DATA OR COMMUNICATIONS

Phone: (517) 373-8080 http://www.house.mi.gov/hfa

Senate Joint Resolution G as enrolled

**Sponsor: Sen. Jim Runestad** 

House Committee: Judiciary [Discharged] Senate Committee: Judiciary and Public Safety

**Complete to 9-27-20** 

Analysis available at http://www.legislature.mi.gov

**BRIEF SUMMARY:** Senate Joint Resolution G 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 Article I 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, briefcase, or person, among other things. In 2014, the U.S. Supreme Court ruled in *Riley v California*<sup>1</sup> that the search of a cell phone incident to an arrest requires a warrant. However, this ruling only addressed accessing data 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. But 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.

#### THE CONTENT OF THE RESOLUTION:

Senate Joint Resolution G 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.

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<sup>&</sup>lt;sup>1</sup> Riley v California, 575 US 373 (2014). See <a href="https://www.supremecourt.gov/opinions/13pdf/13-132\_819c.pdf">https://www.supremecourt.gov/opinions/13pdf/13-132\_819c.pdf</a>

Senate Joint Resolution G passed by a two-thirds vote in each house of the Legislature. To become part of the constitution, the resolution must be approved by the voters at the next general election (an election held in November of an even-numbered year), which in this case is the election to be held November 3, 2020.

#### **BACKGROUND INFORMATION:**

Senate Joint Resolution G is a reintroduction of House Joint Resolution C of the 2017-18 legislative session and House Joint Resolution N of the 2015-16 legislative session.

#### **ARGUMENTS:**

### For:

Adoption of Senate Joint Resolution G means that voters will have the opportunity to decide whether the state constitution should require law enforcement to obtain a warrant before searching a person's electronic devices to retrieve electronic data and communications. 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 U.S. 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 (e.g., cell phone, computer, or tablet). Americans increasingly use the internet to conduct both personal and business affairs, and data are 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 (e.g., a diary, letters, photographs), regardless of where it is stored.

# Against:

Critics of efforts to amend state constitutions regarding search and seizure protections say that 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 sex trafficking crimes and child pornography rings. Further, requiring a warrant before electronic devices or data may be searched may not extend to all situations. For instance, federal law enforcement agencies would not be affected by adoption of the resolution. In addition, case law provides several established exceptions to requiring a warrant before property may by searched. Although the *Riley* decision addressed the first exception—a search incident to an arrest—the other general exceptions (objects in plain view, consent, stop and frisk, an automobile exception, and emergencies/hot pursuit scenarios) could limit applicability of Senate Joint Resolution G in some situations.

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<sup>■</sup> This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.