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## Court of Appeals Declares Facebook 'Private Data' and Other Social Media Subject to Discovery

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By **Maurice Recchia** | February 26, 2018

The New York Court of Appeals has issued an unequivocal declaration that even materials deemed “private” by a Facebook user are subject to discovery, if they contain material relevant to the issues in controversy in litigation. In the decision, the court also reiterates general principles of liberal discovery applicable to all cases and controversies, not just those involving social media material.

# Facts and Procedural History

The case is *Forman v. Henkin*, 2018 N.Y. Slip Op 01015, a unanimous decision, issued by the court on Feb. 13, 2018.

*Forman* is a personal injury case in which plaintiff claims injuries after she fell from a horse owned by defendant. Plaintiff claims spine and traumatic brain injuries which caused cognitive deficits, memory loss, problems writing, and social isolation. Plaintiff testified at her deposition that she had had a Facebook account to which she had posted frequently, including photographs of her pre-accident lifestyle, but that she had closed the account some six months after the accident and could not recall whether she had posted any post-accident photographs before it was closed. Plaintiff further testified that she became a recluse after the accident, had trouble using a computer and writing coherently, and that even writing a simple email could take hours.

Defendant sought access to plaintiff's complete "private" Facebook account.

Plaintiff did not provide the demanded discovery and defendant moved to compel production, asserting that the Facebook material was relevant to the issue of the extent of plaintiff's injuries and to her credibility. Defendant cited plaintiff's deposition testimony that she could no longer cook, travel, engage in sports, ride a horse, or go to the movies, and now had difficulty reading, writing, reasoning, and using a computer; defendant asserted that any photographs and messages plaintiff had posted to Facebook would likely contain information relevant to these allegations.

Plaintiff asserted in her opposition that defendant had failed to provide any basis for access to the “private” portion of her Facebook account.

Plaintiff’s attorney did not affirm that she had reviewed plaintiff’s Facebook account nor did she allege that any of the “private” Facebook material was privileged, or protected on privacy grounds.

At oral argument, defendant asserted that timestamps on Facebook messages would indicate the amount of time it had taken plaintiff to write a post or respond to a message. The Supreme Court judge had asked if there was a way to produce the timestamp data without revealing the contents of posts or messages and defendant stated that there was, though defendant continued to seek the full content of plaintiff’s “private” Facebook material.

The Supreme Court granted the motion, limiting the disclosure, however, to all photographs of herself plaintiff had posted “privately” on Facebook before the accident which she intended to use at trial, all photographs of herself she had posted “privately” on Facebook after the accident but excluding any which may have depicted nudity or romantic relationships, and, for all the post-accident Facebook records which contained timestamp data including the number of characters or words in a message while excluding the content of the messages.

Plaintiff, but not the defendant, appealed to the Appellate Division, First Department. The First Department modified the Supreme Court’s order by limiting disclosure to any pre- or post-accident photographs that plaintiff intended to use at trial and, deleting the requirement for plaintiff to provide an authorization for the timestamp data of her Facebook “private” messages.

# Court of Appeals' Ruling

The Court of Appeals reversed the Appellate Division and reinstated the order of Supreme Court. In so doing, the court cited general principles of discovery and outlined principles for discovery involving Facebook and other social media material referring first to a litigant's discovery obligations pursuant to CPLR §3101(a).

The court cites its seminal decision in *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y. 2d 403 (1968), stating that the court has emphasized that “the words material and necessary are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.” *Id.* at 406.

The court holds that while New York's liberal discovery rules and law provide a party with broad scope, the right to discovery is not unlimited, noting the CPLR's protection for privileged material, attorney work product, and trial preparation material. The court further states that interests must be balanced between the litigant's need for discovery and any special burdens being borne by the opposing party providing it, and that discovery requests must be evaluated on a case-by-case basis, keeping in mind New York's “strong policy” of open disclosure.

Applying these general principles to the facts of the case and addressing Facebook's concept of “public” and “private” user data, the court essentially rules that this distinction is irrelevant to discovery issues in litigation, holding that:

[W]hile Facebook—and sites like it—offer relatively new means of sharing information with

others, there is nothing so novel about Facebook materials that precludes application of New York's long-standing disclosure rules to resolve this dispute.

The court further holds that the First Department erred in implicitly accepting the Facebook categories of "public" and "private" and in applying a higher threshold for disclosure to Facebook's "private" data, holding that such a rule "effectively permits disclosure only in limited circumstances, allowing the account holder to unilaterally obstruct disclosure merely by manipulating 'privacy' settings."

The court holds that by applying a higher threshold rule conditioned on Facebook's "public/private" categories, "disclosure turns on the extent to which some of the information sought is already accessible—and not as it should—on whether it is 'material and necessary' to the prosecution or defense of an action."

Issuing a ruling that addresses general discovery principles and their application to social media materials, the court declares that:

New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists. In many if not most

instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. Thus, we reject the notion that the account holders so-called “privacy” settings govern the scope of disclosure of social media materials.

The court is careful to note that merely starting a personal injury action does not make a person’s entire social media data “automatically discoverable” and that parties are protected from “unnecessarily onerous” discovery demands. To protect a party from improper “fishing expeditions,” courts should employ the well-established discovery rules and must assess the nature of the case and the injuries claimed when deciding whether relevant evidence can be found in a Facebook account. Courts must balance the usefulness of the information sought against the privacy of the Facebook user and should tailor orders particular to the case while avoiding disclosure of irrelevant material, and also consider whether time limitations on material to be disclosed are appropriate.

The court states that parties can move for a protective order pursuant to CPLR §3103(a) to protect themselves from revealing sensitive or embarrassing material of marginal relevance.

Refuting the plaintiff’s assertions that disclosure of social media was an unjustified invasion of privacy, the court states that even assuming that social media is private, “even private materials may be subject to discovery if they are relevant” and cites a personal injury plaintiff’s medical records as an example. The court further holds that for the “purposes of disclosure, the threshold inquiry is not whether the materials sought are private

but whether they are reasonably calculated to contain relevant information.”

Finally, the court notes that the Supreme Court did not give the defendant access to the content of the plaintiff’s messages, and because the defendant did not appeal that ruling, it could not address whether the defendant had made a sufficient showing to get disclosure of that content, leaving that issue open for decision in another case.

*Forman v. Henkin* is a clearly written, sensibly reasoned decision that will have an impact on discovery disputes in general and on such disputes as they involve social media. By citing a litigant’s right to move for a protective order, and in line with its previous holdings regarding discovery, the court clearly stands in favor of liberal discovery in New York litigation.

Defense attorneys and others are already celebrating this decision. Plaintiff attorneys should now be aware, if any haven’t been already, that Facebook or other social media material is subject to discovery if it contains, or even may contain, information which is relevant to the issues in controversy in a legal dispute.