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**§ 6.11****Social Media***There Really is No Such Thing as a Privacy Setting*

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**THE COURTS, ELECTRONIC DISCOVERY, AND PRIVACY**

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Courts in the U.S. basically do not recognize social media privacy. While the European Union has passed laws that provide much higher levels of privacy protections for those who post and read social media content, the same cannot be said in the United States judicial system.

That said, privacy settings and app structure/development present especially challenging (and evolving) issues when it comes to the issues surrounding disclosure and eDiscovery.

The following article from *digitalwarroom.com* provides an excellent overview of the issues presented by various platforms.

**Facebook**

Users have the option to make certain posts private, join private groups and also adjust the privacy settings on a global basis (friends only, friends of friends, public). There are several cases regarding the discoverability of Facebook content hidden behind privacy settings. In *Forman v. Henkin* (2018), the New York Court of Appeals ruled that "private" Facebook posts were subject to the standard rules of discovery. Forman sued Henkin after falling off a horse, and Henkin requested for full access to Forman's private Facebook account as means to fully assess the extent of injuries. In order to find the information, they were looking for, they had to ask the right questions to figure out where the relevant data could be. Facebook? Twitter? Instagram? While information on all these sites is potentially discoverable even with privacy settings turned on, there are several limiting factors which could increase the burden of seeking to uncover private social media accounts. You would need to consider the likelihood for the custodian to be a "superuser", likelihood to find relevant information, difficulties with gaining credentials to an account, difficulties collecting social media posts with all the metadata, and general lack of compatibility between social media collection formats and document review software or e-discovery software.

**Instagram**

Instagram is an interesting one because the entire site is optimized for mobile, forcing us back into the world of collecting individual posts using simple screenshots. You can't capture or image the entire web page all at once like you potentially could with Facebook. In terms of privacy settings, there is the option to set account entirely as private. This is a much more commonly used function on Instagram than on Facebook, mostly because Instagram is plagued with more bot accounts which will attempt to follow you. From a collection standpoint, when an Instagram account is set to private you can see that the account exists but can't see specific photos/posts. Instagram shares a specific feature with Snapchat called "stories". These are a collection of photos and videos which

disappear after 24 hours. In some cases, users may also post a persisting "story" (a timeline of pictures and videos) which does not disappear. This could be based on a certain theme like "Seattle", "Los Angeles", or "Gym", or "Cooking". In cases like this you may also need to consider the ability to capture video, which will again force you back into a more manual collection process (screenshots or screen recordings).

### **LinkedIn**

LinkedIn profiles are mostly useful for getting an overview of job history and descriptions. Keep in mind that LinkedIn is the one social media platform in which users can see who viewed their profile. This is important to note when browsing to get a sense of publicly available information on a given custodian. Anonymity may be one of several good reasons to outsource social media collection efforts.

### **Snapchat**

Snapchat is designed and marketed for allowing users to send and receive photos that disappear after viewing them. Quite the issue for ESI collection, right? There is no real way to tell if there could be potentially relevant information here. In terms of data retainability, most Snapchat users are willfully ignorant in that they know these photos are probably stored in a secret cache somewhere by Snapchat. Aside from this, Snapchat acts as almost a second (or third or fourth) photo reel by using the function of "saving" a photo through snapchat. If the context of litigation required collection of personal photos, then snapchat should absolutely be considered. Photos can be saved in Snapchat; snaps can be "screenshotted". Photo reels saved in Snapchat can reach equal or larger [sizes] compared to the default iPhone "photos" app, so make sure to ask about all possible collection sources to build an accurate data map.

### **Reddit**

Reddit is an up-and-coming social media site where all users stay anonymous. Users can join "subreddits" to follow and discuss worldwide posts related to anything. All accounts on Reddit are designed to be anonymous. Sites like this are going to become more popular because they provide means of expression without revealing personal information or identity. My point here is not necessarily that this type of information is worth discovering, but rather the rise of social media sites like Reddit shows that social media ESI collection is not going to get any easier as privacy settings and social media anonymity become more prominent.

Original Link: <https://www.digitalwarroom.com/blog/tips-for-social-media-preservation>