

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Crim. No. 99-1417 JP

WEN HO LEE,

Defendant.

COURT DETERMINATIONS AND ORDER ON FIRST NOTICE OF DR. WEN HO LEE
UNDER SECTION 5 OF THE CLASSIFIED INFORMATION PROCEDURES ACT

The First Notice of Dr. Wen Ho Lee Under Section 5 of the Classified Information Procedures Act (CIPA) was filed on April 24, 2000 (Doc. No. 56). On July 12, 2000, the Court held a closed hearing on this First §5 Notice in accordance with §6(a) of CIPA. At that time, the Court ordered the Government to file and serve a written statement as to which information identified in Defendant's CIPA §5 Notice the Government agrees meets the use, relevance and admissibility standard of CIPA §6(a). The Defendant was allowed to file and serve a written response to the Government's statement, if the Government took the position that some of the information identified by the Defendant does not meet the use, relevance and admissibility standard of CIPA §6(a). In fact, the Government filed on July 21, 2000 its Supplemental Filing Concerning Use, Relevance and Admissibility of Classified Information Covered by Defendant's First Notice Under Section 5 of the Classified Information Procedures Act (Doc. No.116) and the Defendant filed his Response of Dr. Wen Ho Lee to Government's Supplemental Filing Concerning Use, Relevance, and Admissibility of the Information Covered by the First CIPA §5 Notice (Doc. No.117) on July 25, 2000.

In his First CIPA §5 Notice, the Defendant argues that he is entitled to the disclosure of classified information found in Files 1 through 19 and Tape N because of its relevance to his defense.

The Court hereby makes the following use, relevance and admissibility determinations with respect to the Defendant's First CIPA §5 Notice as required by §6(a) of CIPA.¹

A. Prior Publications-Public Domain Material

1. The parties agree that prior publications are relevant to the issue of Defendant's intent as follows:

a. For Files 2, 3, 5, 6, 7, 8, 9, 11, 13, 14, 15, 16, and 17 and Tape N, all information in the public domain or approved for release into the public domain of which the Defendant had knowledge on or before December 10, 1999.

b. For Files 4, 12, 18 and 19, all information in the public domain or approved for release into the public domain of which the Defendant had knowledge on or before March 31, 1999.

c. For File 1, all information in the public domain or approved for release into the public domain of which the Defendant had knowledge on or before the date certain referenced in the Indictment.

¹The Court notes that the Defendant's response was limited to the question of relevance based on the Defendant's observation that "the prosecution does not appear to dispute either the 'use' or the 'admissibility' of the information...." Defendant's Response, filed July 25, 2000, n. 1. These Determinations address only the relevance issues presented in the Defendant's First CIPA §5 Notice. Issues regarding admissibility, including cumulative evidence and Fed.R. Evid. 403 questions, may still arise and, if they do, will be addressed in a later order. Moreover, the Court hopes that the parties will engage in pretrial discovery methods and procedures recently recommended by the Court in order to limit and manage the volume of evidence which could be produced in a case like this.

d. For File 10, all information in the public domain or approved for release into the public domain of which the Defendant had knowledge on or before the date certain referenced in the Indictment.

2. The parties agree that prior publications are also relevant to the “national defense” element of the offenses charged in Counts 40 through 59 of the Indictment as violations of the Espionage Act (18 U.S.C. §§793(c) and (e)) subject to the above time limitations and only if the publication bears the imprimatur of the United States government or the national laboratories.

3. The Court finds that prior publications, subject to the above time limitations, are necessary for the Defendant to be able to cross-examine witnesses or rebut testimony regarding the “restricted data” element of the Atomic Energy Act (42 U.S.C. §§2275 and 2276). These prior publications are also relevant to the Defendant’s intent regarding “restricted data.” In addition, the Court finds that prior publications made at any time may be relevant evidence for use in the Defendant’s cross-examination of witnesses or in the Defendant’s rebuttal of Government witnesses’ testimony concerning the alleged sensitivity of Files 1 through 19 and Tape N.

B. Flaws in the Codes

Although the parties dispute the existence or magnitude of any “flaws” or imperfections in the various codes at issue, the Court nonetheless finds that evidence of those alleged flaws or imperfections is relevant to the Defendant’s intent to secure an advantage to a foreign nation or to injure the United States. Evidence of these alleged flaws and imperfections is also relevant for use in the Defendant’s cross-examination of witnesses and in the Defendant’s rebuttal of Government witnesses’ testimony on the issue of the sensitive nature of these codes.

C.

D. User Manuals and Material Identification of Documents

The parties appear to agree that the user manuals (with the exception of the user manuals pertaining to Codes B and I) and material identification documents are relevant to the Defendant's intent and to the cross-examination of witnesses who will testify about the alleged "readability" of the files as well as to rebut the Government's evidence that may be presented on the issue of "readability."

E. Comparison of Input Decks and Nuclear Weapons Blueprints

The Court finds that evidence making a comparison of the input decks of Files 1 through 19 and Tape N to a nuclear weapons blueprint is relevant to the Defendant's intent. In addition, this evidentiary comparison is relevant to the cross-examination of witnesses and to the Defendant's rebuttal of Government witnesses' testimony on the Government's assertion that the input decks constitute an electronic blueprint of a nuclear weapon.

F. Nevada Test Site Data/Benchmarking

The Court finds that the information on Nevada test site data is relevant to the Defendant's intent in that he asserts the Nevada test site information found in the codes is widely published with sufficient accuracy to design thermonuclear weapons. This information is likewise relevant evidence to be used in the cross-examination of witnesses who will testify as to the significance of that information and to the Defendant's rebuttal of the Government's evidence on that issue. The parties agree that the benchmarking process is evidence relevant to the Defendant's defense.

G. Work Related Information

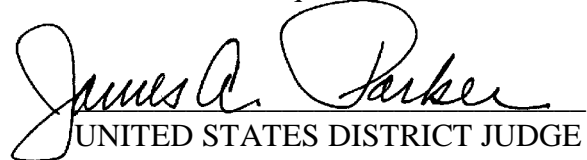
The parties agree that Files 1 through 19 and Tape N are relevant to the issue of whether

the information contained in them relates to the Defendant's official duties at LANL, the Defendant's intent, the cross-examination of witnesses, and the Defendant's rebuttal of Government witnesses' testimony regarding whether those files related to the Defendant's work.

Having made these CIPA §6(a) determinations,

IT IS ORDERED that:

1. The Government must file and serve a motion for substitution and its proposed substitutions in accordance with CIPA §6(c)(1) by August 14, 2000;
2. The Defendant may file and serve a response to the Government's proposed substitutions by August 21, 2000; and
3. If the parties do not agree to the Government's proposed substitutions, the Court will hold a hearing on the Government's motion on August 31, 2000 at 9:00 a.m. in the Rio Grande Courtroom on the third floor at the United States Courthouse in Albuquerque, New Mexico.


UNITED STATES DISTRICT JUDGE