

Legislative Council Panel on Constitutional Affairs
Follow up on issues raised at the meetings on
20 April 2015 and 18 May 2015

Purpose

At the meeting of the Panel on Constitutional Affairs held on 20 April 2015, Members discussed the operation of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) (“ECICO”), and requested the Government to provide information on how to declare in the “Return and Declaration of Election Expenses and Election Donations” (“election return”) communication fees for electioneering activities conducted through the telephone or electronic media. During the discussion on the Proposed Guidelines on Election-related Activities in respect of the District Council Election at the meeting held on 18 May 2015, Members requested the Government to further elaborate on the regulation of election advertisements published through social networking or communication websites on the Internet; they also requested the law enforcement agency to provide figures on candidates who had breached the provisions of ECICO in elections. This paper sets out the relevant information on the above issues for Members’ reference.

How to calculate and declare communication-related election expenses

2. According to the definition in section 2 of the ECICO, “election expenses” means expenses incurred or to be incurred before, during or after an election, by or on behalf of a candidate for the purpose of promoting the election of the candidate, or prejudicing the election of another candidate or other candidates, and include the value of election donations consisting of goods and services used for that purpose. A candidate must keep an accurate account of all election expenses incurred and election donations (whether in cash or in kind¹) received, declare all the election expenses and election donations received in the election return, and submit the election return to the Chief Electoral Officer before expiry

¹ Election donations in kind include goods and services obtained free of charge or at a discount. Unless the discount is generally available to all customers, the difference between the market/regular price and the price charged is an election donation.

of the period specified under the relevant legislation².

3. Whether a particular item of expenditure should be regarded as an election expense is a question of fact to be answered in the circumstances of each case. Each case should be determined by reference to the purpose behind the expense, taking account of the nature, circumstances and context of the expenditure. If an expense is incurred for more than one purpose, there is a need for apportionment of expenses between election-related purposes and any other purposes. The candidate should include relevant particulars in his/her election return. As a general principle, time and usage are relevant factors for consideration. The candidate may seek professional advice on apportionment of expenses as necessary. Any fees incurred for such professional advice will not be regarded as his/her election expenses.

4. A message published through the telephone or electronic media (e.g. websites, social media, communication networks, etc.) is also an election advertisement if such message is published for promoting the election of the candidate, or prejudicing the election of other candidate(s). Any production and maintenance costs (e.g. costs for production and design of the website or webpage, creating and editing the contents, communication fees, etc.) incurred by the candidate for publishing the said election advertisements should be counted as election expenses as well.

5. For calculating communication fees, if a communication fees item is used for more than one purpose, and part of the fees is election expenses, the candidate should apportion the communication fees between election-related purposes and other purposes, and declare the communication fees accordingly. The candidate may use the total amount of communication fees as the basis of calculation, and, depending on the situation, apportion the expenses according to the amount used for election-related purpose.

² For District Council election, according to section 37 of the ECICO, it means not later than 30 days after the publication in the Gazette of the result of the election, or not later than 30 days after the declaration of the termination of the election proceedings under the relevant electoral law, or not later than 30 days after the declaration of the failure of the election under the relevant electoral law or within such extended period as may be allowed by the Court of First Instance under the relevant law.

6. There is no hard and fast rule on apportionment of election expenses. As a general principle, a candidate should adopt an objective standard and practicable measure to apportion and calculate election expenses, such as taking the amount used or usage time as the basis of calculation. The following are some examples on apportionment of election-related communication fees for reference –

Example (1)

The monthly service charge of the mobile phone of a candidate is \$400 and the service plan includes unlimited local airtime and mobile data usage. During the months of July and September, the candidate used the mobile phone for the purpose of promoting his/her candidature in the election (e.g. contacting election helpers or using the instant messaging applications to deliver canvassing messages to electors). If the candidate estimates that the usage for election-related purposes accounts for 25% of the total usage in the three months, the following method may be used to calculate the relevant election expenses –

Total amount of the monthly service charges for July to September:

$$\$400 \times 3 \text{ months} = \$1,200$$

Expenditure as accounting for 25% of the total usage in the three months (i.e. election expenses): $\$1,200 \times 25\% = \300

Example (2)

The candidate's home internet service charge is \$697 per month. During the months from July to September, the candidate used the internet service for election-related purposes (e.g. sending e-mails to electors and publishing election advertisements through writing blogs). The candidate estimates that the total time devoted to such purposes amounted to 44 days. In this regard, the following method may be used to calculate the relevant election expenses –

Total amount of home internet service charges for July to September:

$$\$697 \times 3 \text{ months} = \$2,091$$

Portion of expenses incurred for election-related purposes:

$$\$2,091 \div (31 + 31 + 30) \text{ days} \times 44 \text{ days} = \$1,000.04$$

7. Expenses incurred by the candidate for producing canvassing messages, publicity emails and election advertisements should also be counted as his/her election expenses. The candidate may make reference to the following example to complete Section D8 (other election advertisements) of the election return –

Section D8

Cost for writing the e-mail: \$0 (Note: the e-mail was written by volunteers³. The cost for internet service involved in sending the e-mail is listed in Section E of the election return)

Cost for production and design of the election advertisements: \$300 (Note: Internet service fee for sending the emails is listed in Section E of the election return)

(Please note that, for this expense item, the candidate should also submit the invoice(s) and receipt(s) for the relevant production and design costs.)

8. The above examples are for reference only and serve to illustrate some common practicable means to apportion and declare the expenses. As circumstances would vary from one case to another, the candidate should calculate the communication-related election expenses having regard to his/her own circumstances. The candidate may seek legal advice as necessary if he/she has doubt on whether a particular expense item should be counted as election expenses or how the expenses should be apportioned.

9. On the other hand, as stated in the paper for the meeting on 20 April 2015, section 37(2)(b) of the ECICO requires that, for each election expense of \$100 or above, candidate should submit an invoice and receipt giving particulars of the expenditure. The invoices and receipts should generally include the following particulars-

³ According to section 2 of the ECICO, voluntary service (義務服務) means any service provided free of charge to or in respect of a candidate or candidates at an election by a natural person, voluntarily and personally, in the person's own time for the purpose of-

- (a) promoting the election of the candidate or candidates; or
- (b) prejudicing the election of another candidate or other candidates.

- (a) date;
- (b) details of the expense item (i.e. information and amount of the goods or services);
- (c) information of the organisation or person providing the goods or services; and
- (d) information supporting that the organisation or person providing the goods or services has received the relevant payment in full (e.g. name and signature of the recipient, or the stamp and signature of the authorized person of the organisation).

10. Therefore, if the election expense is of \$100 or more, it is not enough to only declare the expense and the apportionment method in the election return; the candidate must also submit the relevant invoice and receipt so as to comply with the legal requirement.

Publishing election advertisements through social networking or communication websites on the Internet

11. According to section 2 of the ECICO, “election advertisement” means any form of publication published for the purpose of promoting or prejudicing the election of any candidates at an election and “election expenses” mean expenses incurred or to be incurred before, during or after an election, by or on behalf of a candidate for the purpose of promoting the election of the candidate, or prejudicing the election of another candidate or other candidates. As such, the election campaign published by a candidate through on-line platforms such as websites, social networking or communication websites etc. is regarded as an election advertisement and the relevant production and operating costs including internet service fees, on-line advertisement design fees, etc. should be counted towards the candidate’s election expenses and be clearly declared in his/her election return.

12. If the content of the election advertisement published by the candidate through an internet platform shows the support of a person or an organisation, the candidate must obtain the prior written consent of the person or organisation concerned in order to comply with section 27(1) of the ECICO. If, however, web surfers show support to the candidate out

of their own volition by giving responses or indicating “like” in the election advertisement published by the candidate through the said platform, the candidate will then not be required to seek their prior written consent.

13. However, the candidate must not modify the name, logo or pictorial representation of, or any content given by the above web surfers, unless prior written consent on the modification has been obtained from them. Otherwise, the candidate will violate the law.

14. If web surfers merely share or forward different candidates’ election campaigns through the internet platform for expression of views and do not intend to promote or prejudice the elections of any candidates, such sharing or forwarding does not satisfy the definition of publication of election advertisements and the costs involved will not be regarded as election expenses. However, if a web surfer is instructed by the candidate or his/her election helpers to share or forward the election campaigns through the on-line platform with the intention to promote the candidate’s election or prejudice the election of other candidates, such act will be regarded as publication of the candidate’s election advertisements and any costs incurred will have to be included in the candidate’s election expenses.

15. In addition, electioneering messages published through on-line platforms meet the definition of election advertisement. The candidate should comply with all the requirements governing election advertisements and election expenses under the relevant legislations and the guidelines on publication of election advertisements issued by the Electoral Affairs Commission (“EAC”), including that a candidate must provide the election advertisement and relevant information according to the means specified by the EAC to the relevant Returning Officer, or post the election advertisement or a hyperlink of the on-line platform publishing the election advertisement and upload the relevant information onto the “Central Platform” or the “Candidate’s Platform” within 1 working day (i.e. any day other than a general holiday or Saturday) after publication of the election advertisement in order to comply with the public inspection requirement as stipulated in the legislation. For details, please refer to Chapter 7 of the Guidelines on Election-related Activities in

respect of the District Council Election.

Figures related to breaches of the ECICO in elections

16. According to the information provided by the Independent Commission Against Corruption (“ICAC”), the number of complaints and referrals related to breaches of the ECICO received by the ICAC for the 2011 District Council Ordinary Election and 2012 Legislative Council General Election are as follows -

	2011 District Council Ordinary Election	2012 Legislative Council General Election
Complaint or referral cases received	2,647 cases	307 cases
Cases requiring no further actions ⁴	2,209 cases	171 cases
Cases where relief was granted by the court	16 cases (10 persons involved)	11 cases (8 persons involved)
Cases with warning issued	411 cases (400 persons involved)	125 cases (134 persons involved)
Cautioned cases	5 cases (5 persons involved)	0 case
Prosecution cases	6 cases (48 persons involved)	0 case

Constitutional and Mainland Affairs Bureau
Registration and Electoral Office
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⁴ This means the outcome of the case investigation was that the allegations were unsubstantiated, or that the Department of Justice considered the evidence insufficient and hence had not proceeded with prosecution, caution or warning.