

Circuit judge rules state's FOIA unconstitutional



**By Jay
Bender**

SCPA Attorney

A South Carolina Circuit Court Judge has ruled the S.C. Freedom of Information Act unconstitutional as applied to the S.C. Association of School Administrators.

The ruling holds that the association is a public body under the FOIA, but that the law's requirements that public bodies conduct public meetings and provide public access to records unconstitutionally burdens the Association's right to advocate on political issues.

The suit was brought by Charleston radio personality Rocky Disabato, who performs under the name "Rocky D." Disabato had requested access to records relating to the association's efforts with the State Department of Education and others "regarding the debate about the federal stimulus funds in the American Recovery and Reinvestment Act of 2009."

In ruling on the association's motion to dismiss, the court assumed that the association was a public body as it was supported in whole or in part by public funds. In dismissing the case the court ruled that requiring an "advocacy organization" like the association to comply with the open meetings and open records provision of the FOIA would impose an unconstitutional burden on the association's free speech rights.

Disabato has appealed the ruling.

The consequence of the court's ruling is that any corporation supported in whole or in part by public funds could claim an exemption from the FOIA by asserting that it was an "advocacy organization" engaged in political activity. The Supreme Court of South Carolina held in the case *Weston v. Carolina Research & Dev. Found.* that the Foundation's non-profit corporate status did not preclude it from being identified as a public body and having to meet the requirements of the FOIA. The court in the Disabato case sought to distinguish the Weston case by saying that the Supreme Court had not in that case been concerned with a political advocacy corporation such as the association.

Many people in South Carolina may find it interesting that public money may be given to a private, non-profit corporation and that corporation will evade public scrutiny by claiming to be involved in political advocacy.

In addition to ruling that the law was unconstitutional as applied to the association, the court undertook to substitute a one time disclosure rule for the continuous openness of the FOIA. A more appropriate decision would have been for the court to rule that if your organization takes public money, it must act in accordance with the FOIA. Otherwise, we'll have police departments, city governments and school districts claiming to be exempt from the FOIA because they are advocacy organizations.