



This is one in a group of cases the Case Consortium @ Columbia developed in conjunction with the Aga Khan University Graduate School of Media and Communications (a Consortium member at the time). The cases, which look at various aspects of journalism practice in East Africa and South Africa, are being distributed under an agreement with Columbia University (and will be available on the AKU website).

Public Service or Illegal Act?
The Weekly Mail and Bugging Staal Burger
Part A

By mid-1992, the apartheid system of racial segregation in South Africa was coming apart at the seams. In 1990, the iconic black leader Nelson Mandela had been freed after 27 years in jail, and his African National Congress (ANC) was in negotiations with President F.W. de Klerk's National Party (NP) for transfer of power. Despite clear signs of change, right-wing extremists—including many based in the military and police—continued to stage rear-guard actions in an attempt to slow down or halt the proceedings. They seemed to be succeeding; on June 17, 1992, for example, the ANC withdrew from the talks after a massacre, presumably orchestrated by ex-government paramilitary, left 46 dead in the town of Boipatong in the Vaal.

In early August 1992, Philippa Garson, a reporter at the *Weekly Mail*, a national newspaper published in Johannesburg, received a tip that Daniel Ferdinand du Toit Burger was meeting regularly with unidentified men at a hotel in town. Burger had been regional manager of the Civil Cooperation Bureau (CCB), a government covert operations unit disbanded in 1990. A former lieutenant colonel in the South African police force, Burger was nicknamed "Staal" (steel in Afrikaans) for his cruelty in extracting confessions from detainees. The CCB was one of a collection

This case was written by R. Chandrasekhar for the Aga Khan University Graduate School of Media and Communications. (0412)

© 2012 The Aga Khan University Graduate School of Media and Communications. No part of this publication may be reproduced, revised, translated, stored in a retrieval system, used in a spreadsheet, or transmitted in any form or by any means (electronic, mechanical, photocopying, recording, or otherwise) without the written permission of the university.

of rogue elements, dubbed the Third Force, which were committed to disrupting the national political negotiations.

If the tip bore out, the meetings Burger was organizing could provide valuable proof of right-wing activities, from fomenting violence to kidnappings or worse. The *Weekly Mail* had followed Burger and his colleagues for some time, with often dangerous consequences. A 1990 government commission had uncovered evidence that Burger, incensed at reports in the *Weekly Mail*, had once hired a hit man to murder one of its reporters and make it look like robbery (the attempt had failed).

The *Weekly Mail* leadership wanted to take advantage of the tip-off to Burger's meetings. But how? The option they identified surprised them, but seemed the most likely to succeed: use electronic surveillance to monitor the meetings. "It was common knowledge that there was a right-wing tie to the security forces who were out of control of even the politicians," says co-Editor Anton Harber. "A huge part of our effort at the *Weekly Mail* was focused on finding out who were behind the serial violence which, at every turn, was brutal. Garson's lead, I thought, could lead us to its roots."¹ Harber consulted with David Dison, the paper's legal advisor, who said that, should the paper decide to bug Burger's office, he could recommend a private investigator (PI).

Harber, intrigued, met with the PI. But he was torn. On the one hand, the paper could argue that it was a public service to eavesdrop on Staal Burger and his collaborators in order to forestall potential violence. The majority of South Africans wanted the ANC-NP negotiations to resume, and a fresh attack would make that harder to achieve. On the other hand, eavesdropping was illegal. Moreover, the *Weekly Mail* wanted to model behavior for an imminent democracy, not undermine it with clandestine activities of its own. Harber had to decide—should the *Weekly Mail* bug Burger's office, or not?

The Weekly Mail

The *Weekly Mail* was founded in early 1985 by a group of South African journalists who had lost their jobs with the closure of the *Rand Daily Mail*, an English-language newspaper founded in 1902 that had crusaded against racial segregation, winning a readership that was two-thirds black.² The new publication was determined to carry on the liberal legacy of its predecessor. It launched in a record six weeks on a shoestring budget of R50,000 (\$8,000). The first issue rolled out on June 14, 1985, and it published every Friday. The founding team was led by co-Editors Anton

¹ Author's interview with Anton Harber in Johannesburg on January 15, 2012. All further quotations from Harber, unless otherwise attributed, are from this interview.

² See: <http://www.britannica.com/EBchecked/topic/490998/Rand-Daily-Mail>

Harber and Irwin Manoim. They had clearly demarcated roles: Harber was the public face of the *Weekly Mail*, and Manoim headed internal operations.

The team was resourceful. For example, all newspapers were required to register with the government. The official definition of a newspaper was “a periodical disseminated to the public.” But Harber and Manoim had little confidence that the government, given their anti-apartheid track record at the *Rand Daily Mail*, would register the start-up. So they decided to distribute their publication instead to “closed groups” of people. They created a Weekly Mail Society whose members would pay an annual subscription for the society’s “weekly newsletter,” which happened to be the *Weekly Mail*.³

Media lawyers usually saw their role as protecting editorial staff and the publication from litigation. Sometimes reporters experienced that protection as interfering with their freedom to write what they want. But the *Weekly Mail*’s legal counsel encouraged editorial independence. “Our lawyers were a different breed,” says Harber. “They were inventing ingenious ways with which we could say as much as possible by ducking in and out of loopholes in the regulations.” Dison, a Johannesburg-based civil rights lawyer, had been particularly helpful to the *Weekly Mail*.

Censorship. On June 12, 1986, the government imposed a state of emergency, which included press censorship. The media was forbidden to cover certain events, like the actions of security forces, and the government gained wide powers to detain and arrest journalists. The *Weekly Mail*, like other media, developed coping mechanisms. One technique was “oblique speak.” For example, the censor would never accept a sentence like: “Police broke up a demonstration by striking unionists yesterday, using teargas; 10 people were hospitalized with injuries ranging from lacerations to broken bones and later released.” So the *Mail* instead tried to convey the same information indirectly, writing: “Ten trade unionists were released from hospital last night following treatment for bruises, lacerations and broken bones. Earlier in the day, the 10 were seen at an open-air meeting to discuss workplace grievances.”

“Wide-eyed innocence” was another reporting technique. For example, if five plainclothes policemen arrived at a hut in a township and beat up the residents, the *Weekly Mail* expressed mock disbelief that policemen could behave in such a manner. Its report might read: “Five masked thugs broke into a shack at Crossroads and beat up its inhabitants yesterday. The unidentified men, who arrived in cars with no license plates, claimed to be ‘policemen,’ said witnesses.”

For its first few years, the *Weekly Mail* was part of the country’s “alternative press.” But with the release of Mandela and others in 1990, its role changed. *Weekly Mail* reporters had known the black leaders personally for years and, as they moved to center stage in national politics, the paper moved with them.

³ Irwin Manoim, *You have been warned*. Viking 1996.

Investigative. Early on, the *Weekly Mail* established an investigations team, headed by Eddie Koch, which published a series of exposes. A defining moment for the paper was a news story, filed by Koch and Harber in July 1991, which said police had bankrolled the Inkatha Freedom Party, a breakaway from ANC, to block ANC progress. The Inkathagate report, as it became known, was written in collaboration with the British *Guardian Weekly*, which soon became a minority shareholder of the *Weekly Mail*. The story led to three important developments by mid-1992: joint distribution in South Africa of the *Guardian Weekly* with the *Weekly Mail*; a rise in the sales of *Weekly Mail* copies from 20,000 to 29,000 nationally; and an improved financial position for the South African paper.

The *Weekly Mail* in 1986 had commissioned a profile of its readers, which revealed interesting facts. The vast majority were university-educated; many held at least two degrees. Most also read a book a week. There was a 50:50 gender split. Two out of five readers were black and earned the same salaries as their white counterparts. One finding that surprised *Weekly Mail* advertisers was that a majority of readers considered the dense (and arguably too text-heavy) political news in the first seven pages of the *Weekly Mail* its most compelling product. "Our readership consisted of the educated alternative elite," says Harber.

Apartheid and Press Freedom

Mass opposition to apartheid was often thought to have had a resurgence on June 16, 1976 at the Johannesburg township of Soweto. Years of pent up anger at the brutality of apartheid rule finally erupted in a bloody confrontation, which in turn fueled anti-government movements in the rest of the country. Social unrest gained momentum over the next decade, reaching a crescendo in June 1985. On July 21, then-President P.W. Botha declared a state of emergency, followed a year later by the June 1986 curf on press freedom. Newspapers received warnings and notices of suspension for violating restrictions on news dissemination.

The *Weekly Mail* was suspended for four weeks in November 1988 as penalty for not complying with censorship rules. Harber in response called on journalists to fight back as best they could. Only in this way, he reasoned, could the public's "right to know" be preserved in the face of an authoritarian state.⁴ For example, in December 1986 the *Weekly Mail* published the telephone numbers of every cabinet minister on the front page, and urged readers to call them for information on issues—like treatment of detainees—which the government censored.

Only in October 1989, when the government began to release imprisoned ANC leaders, did the South African press began to feel freer. "At the *Weekly Mail*, we were like rabbits caught in the headlights," says Harber. "We took a while in coming to terms with the new found freedom.

⁴ Christopher Merrett, *A Culture of Censorship: Secrecy and Intellectual Repression in South Africa*, David Philip Publishers (Cape Town 1994).

There was no rule of law yet, which would ensure that the same rules would apply to everyone; there was no constitution so far which would ensure compliance with the due process of law. We were in a twilight zone.”

CCB and Burger. During this period of transition, militia such as the Civil Cooperation Bureau emerged as fighters in the battle to save the status quo. Until it was disbanded in 1990, the defense ministry controlled and liberally funded the CCB. Its operatives were instructed to use any means—even murder—to achieve their aims.

Burger had come to the CCB from 24 years with the South African police, where he had risen to the rank of lieutenant colonel. Burger had been forced to resign in early 1988 after two of his officers were found guilty of murder and sentenced to death. CCB hired him within months to head a regional unit. Burger was implicated in the 1989 murder of a Namibian lawyer, but a warrant issued against him lapsed when Namibia gained independence. After 1990, he founded his own security firm, which rented office space at the Breaker’s Hotel in Johannesburg.

By 1992, the ANC was in regular negotiations with the government of President de Klerk to abolish apartheid and transfer political power. The negotiations had broken down, however, after the June massacre in Boipatong, and an outbreak of violence across a number of townships. Militias like the CCB no longer existed, but there were signs that the different groups had recombined as an extra-legal Third Force, and continued to operate underground.

A Tip Comes In

In early August 1992, reporter Garson told Harber that an employee of Breaker’s Hotel had tipped her that Burger used a room in the hotel as an office. Several times a week, and regularly on Mondays, he met with unusual individuals. The names mentioned included Ferdi Barnard, which immediately rang a bell for Garson, who covered politics for the paper. “I was curious,” she says.⁵

Barnard used to work for the CCB and the *Weekly Mail* had tracked the CCB during its official existence. After reporter Gavin Evans reported extensively on its activities, the CCB hired an agent to murder Evans and make it look like a robbery; happily, the attempt failed.⁶ As recently as May 29, Evans had reported that former CCB operatives now worked undercover for the

⁵ Author’s interview with Philippa Garson in New York City on December 14, 2011. All further quotations from Garson, unless otherwise attributed, are from this interview.

⁶ In March 1990, a CCB operative testified before the Harms Commission of Inquiry about the attempted hit on Evans.

country's military intelligence. It was also well known that Barnard had been implicated in the assassination of David Webster, an activist who had many friends in the *Weekly Mail*.

Harber felt that Garson's tip could be valuable. The *Weekly Mail* already believed that the government had outsourced its security activities to rogue elements such as the CCB. If Garson or another reporter (by 1992, the *Mail* employed some 20 reporters) could verify the meetings, or learn what happened at them, the newspaper could potentially unravel the mystery behind the recent wave of township violence. It could also reveal Burger's role. "Harber heard me and quickly saw that I had a story," says Garson. "He asked me, 'Okay, how do we go about it?'" She recalls that Harber picked up the phone and invited Investigations Editor Koch and co-Editor Manoin to meet for a brainstorming session.

Alternatives. Four alternatives surfaced. First, they could assign a reporter to monitor proceedings at the hotel. There was no particular deadline pressure, and they could afford to take time. But that approach had some downsides. The paper wanted to report more than speculation, and a stakeout was unlikely to yield hard evidence. Nor would it generate documents that could withstand scrutiny from a legal point of view. Most likely it would, at best, confirm Garson's tip that the meetings were taking place.

Second, they could interview a hotel employee. But Garson had already tried that. Her source seemed "terrified," she says, at the prospect of going on the record. He had said only that he was instructed to take enhanced security measures for the duration of each meeting; he had made it clear that he was not privy to what went on inside the room. The meetings were closed-door and confidential. Garson thought that trying to interview anyone else in the hotel would lead to a similar result.

Third, they could inform the police that meetings were being held in one of the rooms at Breaker's Hotel, and request that the police investigate. But the suggestion was made only for the sake of argument; it was widely acknowledged that, by and large, the police sympathized with the Third Force.

Fourth, they could engage a private investigator. This was novel; the *Weekly Mail* had never done so. There was a consensus that it was a fascinating idea. Harber said he would pursue the possibility over the next day or two, and see if it was workable. "The discussion was limited to the core team," says Harber, "and it was implicit that it would remain so."

Litmus test

Harber took the matter to attorney Dison, who said that if the *Weekly Mail* were to pursue the option of hiring a PI, he could recommend a local person. The PI would likely plant a device in Burger's office to record the conversation. Dison pointed out that in the event the eavesdropping

yielded newsworthy information, the audiotape could be evidence in a court case if anyone challenged the news report.

The *Weekly Mail* had long been accustomed to being the target of eavesdropping. All newspapers in South Africa assumed that their offices were bugged by the police. Journalists had developed methods to circumvent it. "I had been seeing it from my student days at Wits University," says Garson. "We would be on the phone, and you could hear the police eavesdropping on the conversation. It was common knowledge that the police were bugging the homes of student leaders and apartheid activists at the university. There was always the Big Brother watching. The defensive mechanisms included turning the music loud and using code language."

Eavesdropping was illegal, although the government regularly resorted to that and other extralegal mechanisms with the argument that it was necessary to enforce security. In fact, on July 2, President de Klerk had signed into law (to take effect February 1, 1993) the *Interception and Monitoring Prohibition Act* (No. 127 of 1992), which banned eavesdropping in general but allowed it "in the case of a serious offence or if the security of the Republic is threatened."⁷

Bugging Burger's office would be a kind of role reversal, with an eerie sense of retribution, particularly for a news publication. But the *Weekly Mail* could not afford to take it lightly; it had to ensure that it could justify its actions. There were two legal arguments that a media house could use to try to justify eavesdropping should the case end up in court. The first was public interest. Were the goings-on at Burger's office a matter of public interest? "Given the political circumstances in South Africa, one could take the position in a court of law that they were," says Dison.

The *Weekly Mail* could conceivably contend that it had a responsibility to investigate the nature of the meetings among the former CCB operatives, and inform the public if it found any wrongdoing. "If the CCB operatives were indeed involved in acts of treason," reasons Harber, "the public had a right to know." Adds Robert Brand, a South Africa media trainer:

It is important to remember the context of the times. The legal framework for a democracy was still being built; the bill of rights and the constitution were still being drafted. There was no frame of reference or benchmark one could use to resolve grey areas of the kind that Harber was facing."

⁷ The full phrase was: "[t]o prohibit the interception of certain communications and the monitoring of certain conversations; to provide for the interception of postal articles and communications and for the monitoring of conversations in the case of a serious offence or if the security of the Republic is threatened; and to provide for matters connected therewith." See: <http://www.issafrica.org/cdct/mainpages/pdf/Terrorism/Legislation/South Africa/RSA Interception and Monitoring Prohibition Act 127 of 1998.pdf>

The second argument was that the media house should have exhausted all other possibilities; bugging had to be the last resort. Harber felt that was the case. "There were indeed no other possibilities the *Weekly Mail* could explore," says Harber. "I am not sure if the *Weekly Mail* could obtain evidence in any way other than bugging," says Dison.

The quartet reconvened briefly and went through a "what if" scenario. Harber said that, if they opted for eavesdropping, he would take responsibility for both the decision and its outcome. It was important, Harber said, to ensure the personal safety of both Garson and her source. It was understood that if anything went wrong, Harber alone would take the hit.

To bug or not to bug

Harber met with the PI in the third week of August. The PI brought his assistant. "My first reaction was that they were both young and I wondered whether they were up to it," says Harber. They, however, seemed confident and, in any case, they came recommended. The PI said they could rent a hotel room next to Burger's for a few days. From the room, the agent would drill a hole in the wall and insert a wire with a tape recorder attached to one end and a microphone at the other. The source who had tipped Garson could ensure that the hole was covered and the microphone in Burger's room invisible. Monday, August 31 seemed a good day to activate the listening device.

"The *Weekly Mail* was not in the business of bugging," says Harber, "and so I did not know the bugging procedures. These operatives were in the business day-to-day; they seemed to know. I said I would call them in the evening and let them know my decision." He had lingering doubts. "Bugging breaks the law because it violates the dignity of an individual," says Harber.

Should I authorize an act which is, per se, illegal? Is an illegal act also, by extension, unethical? Are the lines between the two drawn? Will I, in hindsight, be proud as a professional journalist of having sanctioned bugging? How does my decision impact upon the reputation and credibility of the *Weekly Mail* as a publication? What does it mean for the South African media in general?

The world of private investigators in Johannesburg was small; it was also likely porous. "Is the *Weekly Mail* being set up?" he wondered. "Will Burger be tipped off?"