

Legal Uncertainty in Positive Fictitious Applications under Law Number 30 of 2014 on Government Administration after the Enactment of Law Number 11 of 2020 on Job Creation



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ABSTRACT: The authority of the administration to respond to and issue a decision within a certain period of time, and if the predetermined conditions are not met, or the Official and/or Government Agency may ignore it, or silence it, the citizen's request for the issuance of a decision/action is considered to have been granted. This is what is known as a fictitious positive decision or tacit authorization in the UUAP (Administrative Government Law), which still requires review and alignment with previous legal provisions, namely the concept of fictitious negative, after the enactment of Law Number 6 of 2023 on Job Creation. This paper attempts to explain and harmonize fictitious positive and fictitious negative decisions after the enactment of Law Number 6 of 2023 on Job Creation (UUCK).

KEYWORDS: Legal Uncertainty, Positive Fictitious Application, Law

I. INTRODUCTION

Indonesia as a state of law, therefore all aspects of life in the Republic of Indonesia should be based on the provisions of applicable laws and regulations. One of the regulations in this country is about the administration of government, namely "Law Number 30 of 2014 on Government Administration" (hereinafter referred to as: UUAP). One of the regulations is the legal fiction "positive fictitious". which in Article 53 of the UUAP as follows.

The Government Administration Law (UUAP) sets a deadline of 10 (ten) working days for government officials to process a public request. If the government official does not issue a decision on the request within 10 (ten) working days, the request is deemed to have been granted by law. The request that is deemed to have been granted by law cannot be immediately implemented. The UUAP stipulates that after that, the applicant must submit an application to the State Administrative Court (hereafter referred to as the PTUN) to obtain a decision to accept the application for a Decision and/or Action (positive fictitious decision). The PTUN must make a decision within a period of 21 (twenty-one) working days from the date the application is received. "Fictitious" because the government does not actually issue a written decision, but is considered to have issued a written decision, while "positive" because the content of the decision is considered to be "granting" a request (Pratama, 2020). The action of granting an administrative request is the sole authority of the Administrative Body/Official and is within the policy realm of the Administrative Body/Official, which is then formalized through the issuance of an Administrative Decision. This means that not only Administrative Decisions can be challenged, but also any actions taken in the preparation, formation, and fulfillment of administrative decisions. (Utama, 2015) According to Hughes E. Owen, every administrative (government) action can be challenged by citizens in court. Along the way, what is regulated in Article 53 UUAP is also supported by technical regulations by the Supreme Court, with the issuance of "Supreme Court Regulation Number 8 of 2017 concerning Procedure Guidelines for Obtaining Decisions on the Acceptance of Applications to Obtain Decisions and/Or Actions of Agencies and/Or Government Officials", as well as "Supreme Court Circular Letter Number 1 of 2017 concerning the Implementation of the Formulation of the Results of the 2017 Supreme Court Chamber Plenary Meeting as Guidelines for the Implementation of Duties for the Court". Thus, various regulations relating to the implementation of follow-up to positive fictitious applications are deemed to be ready to facilitate this. Conceptually, the birth of a fictitious decision is intended as a means to provide space for the public to file a lawsuit in court. (Desy, 2020). The concept of legal protection in Indonesia actually departs from the meaning of Pancasila, the substance of which means kinship or mutual cooperation. According to Philipus M. Hadjon, this principle based on the spirit of family can also be called the principle of harmony. The principle of harmony underlies the relationship between the government and the people, as well as between one organ of state power and another,

Legal Uncertainty in Positive Fictitious Applications under Law Number 30 of 2014 on Government Administration after the Enactment of Law Number 11 of 2020 on Job Creation

which gives rise to a proportional functional relationship between state powers. (Fauzani & Rohman, 2019)

In subsequent developments, Law Number 11 of 2020 concerning Job Creation (hereinafter referred to as UUCK) was issued, as an "Omnibus Law" regulation which made changes to many laws, including the UUAP. One of the changes related to UUAP is the "positive fiction" regulation. The provisions of Article 175 UUCK regulate as follows

Paragraph (2) "If the provisions of statutory regulations do not specify a time limit for obligations as intended in paragraph (1), Government Agencies and/or Officials are obliged to determine and/or carry out Decisions and/or Actions within a maximum period of 5 (five) days work after the application is received in full by the Agency and/or Government Officials."

Paragraph (3) "In the event that the application is processed via an electronic system and all requirements in the electronic system have been fulfilled, the electronic system determines the Decision and/or Action as a Decision or Action of an authorized Government Agency or Official."

Paragraph (4) "If within the time limit as intended in paragraph (2), the Agency and/or Government Officials do not determine and/or carry out Decisions and/or Actions, the application is considered legally granted."

(5) "Further provisions regarding the form of decision and/or action which are considered legally approved as intended in paragraph (3) are regulated in a Presidential Regulation."

Loss of authority by removing the provisions in Article 175 of the Job Creation Law. By simply providing the view that the State Administrative Court's decision is constructed on positive fiction, the court is prohibited from refusing to examine, try and decide on a case submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and try it as an embodiment of the principle of *ius curia novit*, but if the court does not have the basis of authority to examine, try and decide on a case, then *mutatis mutandis* the decision of the case must be unacceptable (*niet ontvankelijke verklaard*). (Wicaksono, Hantoro, & Kurniawan, 2021) Article 185 letter b UUCK It is stipulated that implementing regulations for this Law must be established no later than 3 (three) months, so that government administration can be called a *yuridische instrumentarium* to achieve the objectives of establishing UUCK (SF, 2018).

The restrictions on *Beleidsvrijheid* are if there are acts that fall into the category of abuse of authority and arbitrary acts, and the pattern for resolving these irregularities is through the State Administrative Court. (Sihotang & et al, 2017). In the UUCK, there are 2 (two) changes to the regulations related to positive fiction, namely: shortening the Government's time period for implementing Decisions and/or Actions, from the previously regulated 10 (ten) working days to 5 (five) working days, and eliminating the role of PTUN. Further provisions for this regulation are regulated in a Presidential Regulation (hereinafter referred to as PP). After the enactment of the UUCK, the Supreme Court then issued Supreme Court Circular Letter Number 5 of 2021 concerning the Implementation of the Formulation of the Results of the 2021 Supreme Court Chamber Plenary Meeting as Guidelines for the Implementation of Duties for the Court, which stipulates: with the promulgation of the UUCK, positive fictitious petitions are no longer within the authority of PTUN. Publication of Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation (hereinafter referred to as PPCK) which was then stipulated by Law Number 6 of 2023 concerning Determination of Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation Becoming Law (hereinafter referred to as UUPPCK). This law repeals and declares UUCK invalid. With regard to positive fiction, this law is still the same as in the UUCK, namely regulating 2 (two) changes, namely shortening the Government's time period for implementing Decisions and/or Actions from 10 (ten) working days to 5 (five) working days, and eliminating the role of PTUN. In the closing provisions, it is stipulated that "all implementing regulations of the Law which have been amended by the PPCK are declared to remain in effect as long as they do not conflict with this PPCK". Factually, to date the situation and conditions are found to be that the PP which was mandated to regulate positive fictitious technical provisions in the UUCK, which was then also regulated in the UUPPCK, has apparently not yet been published. The government (both central and regional), including Government Officials, does not yet have a reference for technical provisions if there is a positive fictitious application. What is regulated in the UUPPCK is still very general, it does not regulate technical matters. On the other hand, the Supreme Court (hereinafter referred to as the Supreme Court) has refused to handle positive fictitious applications because it is no longer within its authority, based on Supreme Court Circular Letter Number 5 of 2021 (hereinafter referred to as SEMA No. 5 of 2021) concerning the Enforcement of the Formulation of the Results of the Chamber Plenary Meeting Supreme Court in 2021 as a Guide to the Implementation of Duties for the Court." Thus, it can be said that currently there is legal uncertainty regarding positive fictitious requests, because this is not in line with the spirit of the establishment of UUAP, namely that government administration services provided to citizens, including through decisions and/or actions against citizens, must be in accordance with the principle of legality. (Government administration must be based on a legal basis) and general principles of good governance.

II. RESEARCH PROBLEMS

The problem formulation taken from the background above is: How should Government Officials respond to the existence of positive fictitious applications when the PP or other laws and regulations governing technical/formal matters for the implementation of positive fictitious applications do not yet exist?

Legal Uncertainty in Positive Fictitious Applications under Law Number 30 of 2014 on Government Administration after the Enactment of Law Number 11 of 2020 on Job Creation

III. RESEARCH METHODS

The research method that will be used is the normative method, namely legal research carried out by examining statutory regulatory materials or secondary data. According to Soerjono Soekanto and Sri Mamudji, normative legal research is also called library research by examining library materials or secondary data. (Ishaq, 2020) This method was chosen because it will examine the incompleteness of norms relating to positive fictitious applications after the promulgation of the UUCK. The primary legal material in this research is the 1945 Constitution, UUAP, UUCK, PPCK, UUPPCK, SEMA

Number 5 of 2021 concerning the Implementation of the Formulation of the Results of the 2021 Supreme Court Chamber Plenary Meeting as Guidelines for the Implementation of Duties for the Court." The secondary legal material for this research will examine legal theories and principles and several studies or expert opinions regarding positive fiction. Next, a qualitative analysis will be carried out by examining potential legal problems that could arise as a result of the absence of a Presidential Regulation or other statutory regulations governing the technical/formal matters of implementing positive fictitious applications, and a proposed analysis of the attitude that can be taken by Government Officials when they encounter a situation that exists. positive fictitious application.

IV. LITERATURE REVIEW

A. Legal Certainty Theory

As a rule of law country, legal certainty is one of the fundamental aspects of law enforcement efforts. Laws in the context of regulations that have been made by legislators will be useless or less useful if they are weak in their enforcement. On the other hand, it is deemed that law enforcement will not be able to run optimally if the existing regulations are deemed not to be clear or complete enough in regulating the substances that are to be regulated. There are several opinions regarding the theory of legal certainty. Gustav Radbruch explained that in the theory of legal certainty that he put forward there are four basic things that are closely related to the meaning of legal certainty itself, namely; Law is a positive thing which means that positive law is legislation. The law is based on a fact, meaning that the law is made based on reality. Facts contained or included in the law must be formulated in a clear manner, so that they will avoid errors in terms of meaning or interpretation and can be easily implemented. Positive law must not be easily changed. (Ananda, 2021) Gustav Radbruch's opinion regarding legal certainty is based on his view regarding legal certainty, which means legal certainty itself. Gustav Radbruch stated that legal certainty is a product of law or, more specifically, a product of legislation. (Ananda, 2021). Apart from Gustav Radbruch, Jan M. Otto also expressed his opinion regarding the legal certainty required in the following matters. Legal certainty provides legal rules that are clear and clear, consistent and easy to obtain or access. These legal rules must be issued by state authorities and have three characteristics, namely clear, consistent and easy to obtain. Several ruling institutions or governments can apply legal rules in a consistent manner and can submit or obey them. The majority of citizens in a country have the principle of being able to agree to the content contained in the content. Therefore, citizens' behavior will adapt to the regulations issued by the government. Judicial judges have an independent nature, meaning that judges do not take sides in applying legal rules consistently when the judge can finalize the law, decisions from the judiciary can be concretely implemented. (Ananda, 2021). According to Jan

M. Otto, the five conditions for legal certainty show that legal certainty can be achieved if the substance of the law is in accordance with the existing needs of society. (Ananda, 2021). In contrast to Gustav Radbruch who stated that legal certainty is one of the goals of law, Sudikno Mertokusumo stated that legal certainty is a guarantee so that the law can run properly, meaning that with legal certainty the individual who has rights is the one who has received a decision from the legal decision. Alone. (Ananda, 2021).

B. Settings & Understanding

-Government administration :

According to the UUAP, government administration is defined as "management in making decisions and/or actions by government bodies and/or officials".

-Positive fiction:

According to Enrico Simanjuntak, the positive fictitious concept in UUAP is a legal fiction which requires the administrative authority to respond or issue decisions/actions submitted to it within the specified time limit and if this prerequisite is not fulfilled the administrative authority is deemed to have granted the request for the issuance of the decision/action requested by it. . (Pratama, 2020). It is called "fictitious" because in essence the Government has never made a decision in writing, but is considered to have determined it, while it is said to be "positive" because the Government is deemed to have granted the request of the community members. The concept of positive fiction as regulated in the Government Administration Law is based on the principle of *lex posteriori derogate legi priori*. (Sahlan, 2016). Based on the type, there are two types of fictitious decisions, namely negative fictitious decisions and positive fictitious decisions. (Wairocana & et al, 2020). In fact, positive fiction itself is the basis for improving good governance to prevent practices of corruption, collusion and nepotism, so that a better, more transparent and efficient bureaucracy will be created. These are the attitudes, behavior, culture and patterns of administrative action that are democratic, objective and professional. (Marbun, 2018).

-Negative fictitious:

Legal Uncertainty in Positive Fictitious Applications under Law Number 30 of 2014 on Government Administration after the Enactment of Law Number 11 of 2020 on Job Creation

Before the enactment of Law No. 30 of 2014 concerning Government Administration, relating to state administrative decisions, the Indonesian state adhered to the concept of negative fiction. The formulation governing negative fiction is contained in article 3 of Law Number 5 of 1986 concerning PTUN (hereinafter referred to as UUPTUN), Paragraph (1) of article 3 determines the basic principle, namely that "every State Administrative Agency or Position is obliged to serve every the request of a member of the public that he accepts if the matter requested of him according to the basic regulations becomes his duty." (Indroharto, 2015). Article 3 UUPTUN, as follows "If a State Administrative Agency or Official does not issue a decision, even though this is their obligation, then this matter is equivalent to a State Administrative Decision. If a State Administrative Agency or Official does not issue the requested decision, while the time period specified in the statutory data in question has passed, then the State Administrative Agency or Official is deemed to have refused to issue the intended decision. "In the event that the relevant statutory regulations do not specify the time period as intended in paragraph (2), then after a period of four months has passed since the receipt of the application, the relevant State Administrative Body or Official is deemed to have issued a decision of rejection."

The concept of negative fictitiousness emphasizes that a State Administrative body or official is deemed to have refused to issue the decision in question if the time period for issuing the decision expires. (Yuniza & Inggawati, 2021). The terminology of negative fiction, like the term "positive fiction", is not mentioned explicitly in each law. These two terms, or rather neologisms, are legal fictions used to simplify legal construction in Article 3 of the Peratun Law or Article 53 of the UUAP. (Simanjuntak, 2018). Comparison between negative fiction based on Law no. 5 of 1986 concerning State Administrative Courts with positive fiction based on UUCK, as follows:

No.	Criteria	Negative Fictitious	Positive Fictitious
1.	Silence/Refusal	to issue a decision	Approval of the application
2.	Mechanism	by filing a lawsuit.	By submitting an Application.
3.	Subjects	Plaintiff and Defendant (possible intervention party).	Petitioner and Respondent (intervention is not possible).
4.	Decision	Objects	Decisions and/or Actions.
5.	The grace period	90 (ninety) days from 4 (four) months of receipt of the application if it is not regulated in the basic regulations.	It is calculated as 90 (ninety) days from 10 (ten) working days of receipt of the application if it is not regulated in the basic regulations.
6.	Time limits for examinations.	are the same as for ordinary lawsuit examinations.	Must be terminated within 21 (twenty one) working days.
7.	Legal remedies	Legal remedies can be taken.	First and final level.

V. RESULTS AND DISCUSSION

As a rule of law state as mandated in Article 1 paragraph (3) of the 1945 Constitution, legal certainty is one of the fundamental aspects in law enforcement efforts. In Law Number 12 of 2011 Article 6 paragraph (1) letter 1 concerning the Formation of Legislative Regulations (hereinafter referred to as UUPPU), regulates that one of the principles in statutory regulations is the principle of legal certainty. Many expert opinions explain legal certainty, one of which is Jan M Otto who states that legal certainty provides legal rules that are clear and clear, consistent and easy to obtain or access. (Ananda, 2021) These legal rules must be issued by state authorities and have three characteristics, namely clear, consistent and easy to obtain. Clear legal rules, meaning that the legal rules have clear interpretations, do not have multiple interpretations, and are complete in their regulations, so that these rules can be easily implemented.

What happened in the norms regarding positive fictitious requests after the promulgation of the UUCK, which has been explained in the Introduction section, is very clearly seen that the mandate for regulating positive fictitious Decisions and/or Actions is regulated in the Presidential Regulation (PP), until now the PP not yet determined. On the other hand, the Supreme Court (MA) has also issued a circular prohibiting the PTUN from accepting cases requesting positive fictitious determinations. Thus, legal certainty in this matter is not fulfilled. Government officials as elements of government administration are faced with conditions of legal uncertainty, even though it is also impossible for government officials to prohibit citizens from making positive fictitious requests, considering that this has been mandated in the UUAP. Likewise, when a member of the public submits a request for a positive fictitious determination to the PTUN. UU no. 48 of 2009 concerning Judicial Power, Article 10 paragraph (1) states that: "The court is prohibited from refusing to examine, try and decide on a case submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and try it. SEMA's provision that the PTUN has no authority to handle applications for positive fictitious determination cases is certainly far below the Law and refers to the legal principle "Lex Superior derogat Legi Inferiori", so the provisions used are the Law. According to Article 10 of Law No. 30 of 2014, the scope of general principles of good governance (AUPB) in government administration is as follows.

1. The principle of legal certainty.

According to Sudikno Mertokusumo, legal certainty is a guarantee that the law is implemented, that those entitled to it according to

Legal Uncertainty in Positive Fictitious Applications under Law Number 30 of 2014 on Government Administration after the Enactment of Law Number 11 of 2020 on Job Creation

the law can obtain their rights and that decisions can be implemented. (Arifiana, Fahmib, Arrasulic, d, & Fikri, 2022).

The principle of legal certainty in a rule of law prioritizes the basic provisions of laws and regulations, propriety, consistency and justice in every government administration policy. The positive fictitious arrangements in the UUAP can be said to be sufficient to fulfill this principle. Positive fictitious arrangements provide a basis for certainty when Government Officials do not respond to public requests. Material and formal provisions have been sufficiently Regulated both in the UUAP and other technical regulations outside the UUAP, such as Supreme Court Regulations and Supreme Court Circulars.

2. The principle of benefit.

Benefits that must be considered in a balance between: (1) the interests of one individual and the interests of other individuals; (2) individual interests with society; (3) the interests of community members and foreigners; (4) the interests of one community group and the interests of another community group; (5) government interests with community members; (6) the interests of the current generation and the interests of future generations; (7) the interests of humans and their ecosystem; (8) the interests of men and women. (Pratiwi, Purnamawati, Fauzi, & Purbawati, 2016).

3. Impartiality, namely the principle that requires government agencies and/or officials to determine and/or implement decisions and/or actions that take into account the interests of the parties as a whole and are not discriminatory. (Aris, Tambunan, Putri, & Nugraha, 2022). This principle is a principle that requires Government Agencies and/or Officials to determine and/or carry out Decisions and/or Actions by considering the interests of the parties as a whole and not being discriminatory.

4. Principle of accuracy.

Elucidation of Article 10 paragraph (1) letter d of the Government Administration Law explains the Principle of Accuracy requiring that a Decision and/or Action must be based on complete information and documents to support the legality of the determination and/or implementation of the Decision and/or Action so that the Decision and/or Action concerned is prepared carefully before the Decision and/or Action is determined and/or carried out.

5. The principle of not abusing authority.

Article 17 Paragraph (2) Law Number 30 of 2014 concerning Government Administration. We can find the concept of abuse of authority in law. State Administration or HAN. Abuse of Authority is an action where Government officials use their authority to create or take decisions and/or actions in government management carried out not in accordance with authority, mixing up authority and/or act arbitrarily. (Rizkyta & Ningsih, 2022).

6. Principle of openness.

Explanation of Article 10 paragraph (1) letter f of the Government Administration Law The principle of openness is a principle that serves the public to gain access to and obtain correct, honest and non-discriminatory information in the administration of government while still paying attention to the protection of personal, group and state secrets and human rights. .

7. Principle of Public Interest.

Explanation of Article 10 paragraph (1) letter g of the Government Administration Law. The principle of public interest is a principle that prioritizes public welfare and benefit in a way that is associative, accommodating, selective and non-discriminatory. The principle of public interest or the principle of implementing public interests basically requires that the government in carrying out its duties prioritizes the public interest, namely interests that cover all aspects of the lives of many people.

8. Principles of good service.

In the Elucidation to Article 10 paragraph (1) letter h UUAP explains that the principle of good service is the principle of providing timely service, clear procedures and costs, in accordance with service standards and statutory provisions.

Protection of applicant's rights after the implementation of a positive fictitious State Administrative Decree (KTUN), when referring to the UUAP vide article 53 paragraph (6), clearly stipulates that Government Officials have the obligation to follow up on the Court's decision on a positive fictitious application by making a Decree regarding the implementation of the court decision, at most no later than 5 (five) working days after the Court decision is determined. Thus, regulations regulate the power of coercion for Government Officials to follow up on Court decisions. If a government official does not implement this provision, the PTUN has the authority to carry out the execution, as regulated in the PTUN Law and other regulations. This is different from protecting the applicant's rights after the implementation of the positive fictitious KTUN by referring to UUCK and now UUPPCK. In UUCK and UUPPCK, the court's authority is removed, so that the positive fictitious process stops in the executive domain (positive fictitious-Fixed), but there are no further regulations regarding the execution of positive fictitious KTUN determinations. In this regard, there is no legal certainty regarding the protection of the applicant's rights after the implementation of the positive fictitious KTUN in accordance with UUCK and currently UUPPCK. Again, the UUAP provides space for options that can be carried out by Government Officials in facing conditions of legal uncertainty. In the UUAP, discretion is defined as "Decisions and/or Actions determined and/or carried out by Government Officials to overcome concrete problems faced in the administration of government in terms of laws and regulations that provide choices, do not regulate, are incomplete or unclear, and/or government stagnation". It is clear that one of the criteria for discretion is the existence of incomplete or unclear statutory regulations. Thus, in response to the conditions for regulating positive fictitious applications, the technical regulations in the form of Presidential Regulations have not yet been

Legal Uncertainty in Positive Fictitious Applications under Law Number 30 of 2014 on Government Administration after the Enactment of Law Number 11 of 2020 on Job Creation

established, it is possible for Government Officials to respond to positive fictitious applications with discretionary authority. However, what needs to be paid attention to is that the exercise of discretion must be in accordance with the provisions regulated in the UUAP. Because in the end, future public services are expected to be able to implement good governance in an effort to provide legal certainty and justice for the community. This means that the judicial body as a means of control over positive fiction should not be eliminated in order to guarantee legal certainty and protection for the people. So it is in accordance with the formulation "rechtsbesherming van de burgers tegen de overheid" (in Dutch language literature) and "legal protection of the individual in relation to acts of administrative authorities." (Fauzani & Rohman, 2020).

VI. CONCLUSIONS

How should Government Officials respond to the existence of positive fictitious applications when the PP or other laws and regulations governing technical/formal matters regarding the implementation of positive fictitious applications do not yet exist?

Based on the discussion above, it can be concluded that currently there is legal uncertainty regarding requests for decisions and/or actions of Government Officials by positive fictitious means. This can have impacts, including the following. The mandated Presidential Regulations have not yet been established, giving rise to confusion, ambiguity and doubt for Government Officials as to how to behave or respond, when they encounter a situation where there is a positive fictitious request addressed to the Government. If there is an attitude/response to a positive fictitious request, it can be seen as weak from a "legal standing" perspective, because there is no legal basis regarding the technical provisions for implementation (Presidential Regulations have not yet been established). On the other hand, as mandated in the UUAP, government administration is subject to the principle of legality. In the absence of a legal basis for the technical provisions for positive fictitious applications, there is potential for Government Officials to take different attitudes regarding positive fictitious applications. This creates legal uncertainty. This will have the potential for legal chaos, when members of the public as positive fictitious applicants, compare one Government Official with another, in responding to the positive fictitious. It could happen that government officials remain silent regarding positive fictitious requests, and community members respond by filing a lawsuit against the government based on the UUPPCK alone. Government officials can respond to the lawsuit by taking part in a trial, but in the end this causes problems, because this should not happen if the technical regulations for implementing positive fictitious requests have been established. If there are members of the public who continue to submit applications for positive fictitious determinations to the State Administrative Court or to other courts, it will become a polemic for that court, linked to the provisions that the court is prohibited from examining, adjudicating and deciding cases. In connection with these matters, the following suggestions are given:

A Presidential Regulation which regulates further provisions regarding the form of decisions and/or actions which are considered to be legally approved, must be immediately stipulated. In this way, there is legal certainty regarding the technical provisions of positive fictitious applications. Before the issuance of the Presidential Regulation in question, Government Officials need to be careful in responding to positive fictitious requests, lest they cause legal problems in the future. The UUAP has provided room for discretion, but the exercise of discretion must be in accordance with the provisions regulated in the UUAP.

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Legal Uncertainty in Positive Fictitious Applications under Law Number 30 of 2014 on Government Administration after the Enactment of Law Number 11 of 2020 on Job Creation

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